Supreme Court, U.S.
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No. 04-820

IN THE

Supreme Court of the United States

CLIFFORD ACREE, *et al.*,

Petitioners,

v.

REPUBLIC OF IRAQ, *et al.*

and

UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a U.S. citizen who has been tortured by a state sponsor of terror have a cause of action against the foreign sovereign under either state or federal law?

2. Does a U.S. citizen who has been tortured by a state sponsor of terror have a cause of action against the foreign sovereign for a violation of universally accepted international legal norms against torture?

PARTIES TO THE PROCEEDING

The following is a list of all parties who appeared in the court whose judgment is sought to be reviewed:

Petitioners / Plaintiffs-Appellees below:

Colonel Clifford Acree
Lieutenant Colonel M. Craig Berryman
Staff Sergeant (Ret.) Troy Dunlap
Colonel (Ret.) David Eberly
Lieutenant Colonel (Ret.) Jeffrey Fox
Chief Warrant Officer (Ret.) Guy Hunter
Sergeant David Lockett
Lieutenant Colonel H. Michael Roberts
Lieutenant Colonel Russell Sanborn
Commander Lawrence Slade
Major (Ret.) Joseph Small
Sergeant (Ret.) Daniel Stamaris
Lieutenant Colonel R. Dale Storr
Major Robert Sweet
Lieutenant Colonel (Ret.) Jeffrey Tice
Robert Wetzel
Commander Jeffrey Zaun
Cynthia Acree
Leigh Berryman
Gail Stubblefield
Ronald Dunlap
Barbara Eberly
Timm Eberly
Dr. Robert Fox
Terrence Fox
Patricia Borden
Nancy Gundersen
Timothy Fox
Mary Hunter

Laura Hunter
William (Ray) Hunter
Mary Elizabeth (Lily) Hunter
Patricia Roberts
Starr Barton
Anna Slade
Leanne Small
David Storr
Douglas Storr
Diane Storr
Arthur Sweet
Mary Ann Sweet
Michael Sweet
Jacqueline Wetzel
William Wetzel
James Wetzel
Edward Wetzel
Margaret Wetzel
Paul Wetzel
Kathleen Farber
Anne Kohlbecker
Sally Devin
Calvin Zaun
Marjorie Zaun
Linda Zaun Lesniak

Defendants:

Republic of Iraq
Iraqi Intelligence Service
Saddam Hussein, in his official capacity
as the President of Iraq

Intervenor:

United States of America

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The opinion of the court of appeals (Pet. App. A) is reported at 370 F.3d 41. The order of the court of appeals denying rehearing en banc is unpublished and appears as Pet. App. E. The opinion of the district court denying the United States' post-judgment motion to intervene (Pet. App. B) is reported at 276 F. Supp. 2d 95. The opinion of the district court entering judgment against defendants Republic of Iraq *et al.* (Pet. App. C) is reported at 271 F. Supp. 2d 179.

STATEMENT OF JURISDICTION

The court of appeals denied petitioners' request for rehearing en banc on August 19, 2004. On November 8, 2004, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including December 17, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* ("FSIA"), are reproduced at Pet. App. F.

STATEMENT OF THE CASE

This case raises important and recurring questions concerning the ability of U.S. citizens who are victims of state-sponsored terrorism to seek redress against terrorist states in federal courts. The decision of the court of appeals effectively bars victims of terror from pursuing claims against terrorist states in the D.C. Circuit, which is, in effect, the

mandatory venue for claims relating to acts of terror committed against U.S. citizens overseas. The D.C. Circuit's interpretation of the FSIA as requiring an independent "federal cause of action" departs from the plain meaning of the FSIA, as interpreted by the Court, and the consistent practice of other circuit courts of appeals in recognizing the availability of state law causes of action. Moreover, the decision of the court of appeals ignores the clear intent of Congress to make federal courts available to U.S. citizens who are victims of terror.

The error of the D.C. Circuit's decision is strongly confirmed by the decision of the Court last term in *Sosa v. Alvarez-Machain*, 542 U.S. __, 124 S. Ct. 2739 (2004). *Sosa* makes clear that common law causes of action may serve as the basis for claims that arise under a specific grant of federal jurisdiction, such as the grant of jurisdiction to federal courts under 28 U.S.C. §§ 1330 and 1605(a)(7) to hear claims against state sponsors of terror for acts of torture committed against U.S. citizens. Consistent with this conclusion, the Court has already held that foreign sovereigns may be liable under state law rules of liability. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983). *Sosa* further suggests that petitioners have a separate and independent cause of action under federal common law for violations of universally recognized international legal norms.

The Court should grant the petition in order to resolve uncertainty among the circuit courts of appeals concerning the sources of law under the FSIA and to resolve important federal statutory issues relating to the ability of U.S. citizens to bring suit against terrorist states for acts of terror committed against them. These issues are exceptionally

important in light of the war on terror in which the nation finds itself. Moreover, the unique role that the D.C. Circuit plays in vindicating the claims of U.S. citizens against terrorist states means that the errors of that court will effectively close the doors of justice for victims of terror unless reviewed and corrected by the Court.

The Court may also wish to consider whether it should grant the petition, vacate the decision, and remand to the court of appeals for reconsideration of the cause of action issue in light of *Sosa* and the *First National City Bank* line of cases.

1. Petitioners are 17 current and former United States military personnel and 37 of their family members. The servicemen were brutally tortured while held as POWs by Saddam Hussein's regime during the 1991 Gulf War, with lasting physical and emotional consequences for themselves and their families. The torture included severe beatings, electric shock, burns, whipping, starvation, subjection to severe cold and filth, genital inspections (to identify Jews), mock executions, and threatened castration and dismemberment. Injuries included a fractured skull, broken bones, broken ear drums, broken noses, and repeatedly being knocked unconscious. Because Iraq publicly announced that the POWs would be used as human shields, and refused to provide notice as to the POWs it was holding, spouses did not know whether they were wives or widows. The effect has been serious lasting injury for the POWs and their family members.

2. On April 4, 2002, petitioners brought suit in the United States District Court for the District of Columbia against the Republic of Iraq, the Iraqi Intelligence Service,

and Saddam Hussein in his official capacity. Petitioners sought monetary damages for the acts of torture committed against them and for the pain, suffering, and severe mental distress of their family members. Jurisdiction before the district court was based on 28 U.S.C. § 1330 as a claim for relief with respect to a foreign state not entitled to immunity under § 1605(a)(7) of the FSIA.

a. Section 1605(a)(7) abrogates the immunity of foreign sovereigns in cases in which "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking" provided that the foreign state was designated as a state sponsor of terrorism at the time the act occurred. 28 U.S.C. § 1605(a)(7).

b. Iraq was designated as a state sponsor of terrorism at the time the acts in question occurred.

3. In their submissions to the district court, petitioners identified four distinct bases for a cause of action: (i) common law torts rooted in state law and applicable to the defendants under 28 U.S.C. § 1606, which provides that a "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances;" (ii) the cause of action that Congress enacted in the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), including 28 U.S.C. § 1605(a)(7); (iii) the further specification of that cause of action later in the same term through the adoption of the Flatow Amendment, Pub. L. No. 104-208, § 589, 110 Stat. 3009 (1996) (codified at 28 U.S.C. § 1605 note); and (iv) the application of the doctrine of *respondeat superior* to the actions of Iraq's officials, employees, and agents through

28 U.S.C. § 1606. *See* Pet. App. G (excerpts from legal brief and proposed findings of fact and conclusions of law submitted to district court, and oral argument before the court of appeals).

4. Defendants twice ignored offers to arbitrate the claims in accordance with accepted international rules of arbitration. Subsequently, none of the three defendants in the underlying action appeared to defend the suit. After satisfying itself of jurisdiction under 28 U.S.C. § 1330 and § 1605(a)(7), the district court issued an entry of default on September 25, 2002. *See* Pet. App. D. The United States was at all times fully aware of the proceedings before the district court. Service upon the Iraqi defendants was effected through the Department of State, as required under the FSIA, and copies of the complaint were provided to high-level administration officials, including the Vice President, Deputy Secretary of Defense and the State Department Legal Adviser.

5. On July 7, 2003, the district court entered a final judgment in favor of petitioners, finding all three defendants liable to petitioners for $653 million in compensatory damages and finding Saddam Hussein and the Iraqi Intelligence Service liable to petitioners for an additional $306 million in punitive damages. The district court found that petitioners had a valid cause of action under the Flatow Amendment to the FSIA, 28 U.S.C. § 1605 note, and had also satisfied the elements of the common law torts of assault, battery, and intentional infliction of emotional distress. *See Acree*, 271 F. Supp. 2d at 215-17.

6. The United States first moved to intervene in this action on July 21, 2003 – two weeks after the entry of final judgment. Together with its motion to intervene, the United

States filed a motion to vacate the judgment pursuant to Fed. R. Civ. P. 59(e). In support of the latter motion, the United States claimed that the district court lacked jurisdiction at the time it entered the judgment, citing authority allegedly conferred upon the President under § 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (EWSAA). The district court denied the motion to intervene as untimely and considered the Government's jurisdictional argument "meritless." *Acree v. Republic of Iraq*, 276 F. Supp. 2d 95 (D.D.C. 2003).

7. The United States appealed the district court's denial of the motion to intervene to the D.C. Circuit. The United States argued that the district court abused its discretion in denying the Government's motion to intervene and repeated its contention that the district court lacked subject matter jurisdiction. The United States raised no other issue on appeal and, in particular, did not argue either before the district court or the D.C. Circuit that petitioners lacked valid causes of action for the relief they sought.

8. Less than forty-eight hours before oral argument was scheduled, the D.C. Circuit directed the parties to be prepared to address whether the case should be dismissed or remanded in light of the D.C. Circuit's decision in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004) (Pet. App. H). In *Cicippio-Puleo*, decided after the district court's judgment in *Acree*, the D.C. Circuit held that neither § 1605(a)(7) of the FSIA nor the Flatow Amendment, "separately or together, establishes a cause of action against foreign state sponsors of terrorism." *Id.* at 1027.

9. The Iraqi defendants had waived any defense relating to the availability of a cause of action by not appearing before the district court. *See* Fed. R. Civ. P. 12(h)(2) (failure to state a cause of action waived if not raised before the close of trial). Implicitly recognizing that any defense relating to cause of action had been waived by default, and consistent with its position that state law may provide a cause of action under the FSIA, the United States did not raise the issue in its motion to intervene or in its appeal to the D.C. Circuit.

10. At oral argument, petitioners' counsel explained to the court that the pleadings in this case had alleged causes of action other than a cause of action under § 1605(a)(7) and the Flatow Amendment, including common law torts under state law. Petitioners' counsel further explained that the district court had made extensive findings and conclusions to support defendants' liability under these tort causes of action. Accordingly, petitioners contended that *Cicippio-Puleo*, even if correctly decided, had no effect on the judgment and warranted, at most, a remand to the district court to confirm this conclusion. This was, in fact, the course of action that the D.C. Circuit had taken in *Cicippio-Puleo* itself.

11. Notwithstanding the fact that the issue was not on appeal and had not been briefed, and notwithstanding the fact that the issue related to a non-jurisdictional defense that defendants had waived by default, the D.C. Circuit issued a decision vacating the judgment on the grounds that there was no valid cause of action, citing *Cicippio-Puleo*.

a. The court reiterated its conclusion in *Cicippio-Puleo* that the Flatow Amendment only creates a cause of action against officials, employees, or agents of a terrorist state who commit the acts of terror specified in the statute while acting in their "personal capacities."

b. With respect to the tort causes of action that the petitioners had alleged under state law and that the district court had found to be satisfied, the court held that "generic common law cannot be the *source* of a federal cause of action," ignoring petitioners' cause of action rooted in state law. *Acree*, 370 F.3d at 59 (emphasis in original).

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's Decision in *Acree* Conflicts with This Court's Decisions in *First National City Bank* and *Sosa* and with the Decisions of Other Circuits

A. The D.C. Circuit's Decision is Contrary to *First National City Bank* and Contrary to Decisions of Other Circuit Courts of Appeals

The FSIA provides: "As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state *shall be liable* in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U.S.C. § 1606 (emphasis added). The Court has interpreted § 1606 to provide that "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983). Thus, federal courts may hear a claim against a foreign sovereign where a "rule of liability" under state law would render a private individual liable under like circumstances, provided that the foreign sovereign is not entitled to immunity with respect to that claim. Common law torts, including those considered by the district court in this case, are paradigmatic "rules of liability."

By establishing that foreign sovereigns "shall be liable" for claims with respect to which they do not possess immunity, section 1606 creates a cause of action to assert state law claims, including common law torts, against foreign sovereigns. The Court has held that use of the statutory term "shall be liable" gives rise to a cause of action. *Key Tronic Corp. v. United States*, 511 U.S. 809, 822 (1994) (Scalia, J., dissenting in part) ("Surely to say that A shall be liable to B is the *express* creation of a right of action."); (Stevens, J., writing for majority) ("Justice Scalia correctly notes that 'to say that A shall be liable to B is the *express* creation of a right of action.'") *id.* at 818 n.11. Because foreign sovereigns do not possess immunity for acts of torture under § 1605(a)(7) of the FSIA, plaintiffs may bring claims against foreign sovereigns for acts of torture to the extent that a private individual would be liable under state law in like circumstances.

The use of state law causes of action under the FSIA is so commonplace that district courts and circuit courts of appeals routinely adjudicate state law claims under the FSIA without questioning the statutory basis for these claims. This rule has been followed by at least the Second, Fifth, Seventh, Eighth, and Ninth Circuits, and, other than *Acree*, petitioners are not aware of any contrary authority. *See, e.g.*, *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002) (applying Missouri law); *Blaxland v. Commonwealth Director of Public Prosecutions*, 323 F.3d 1198 (9th Cir. 2003) (applying California tort law); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002) (applying New York choice of law principles); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380 (5th Cir. 1999) (Mississippi and federal law claims); *In re Air Crash Disaster*

Near Roselawn, Ind., 96 F.3d 932 (7th Cir. 1996) (wrongful death claims under Illinois law); *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957 (2d Cir. 1991) (New York law); *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 143 (2d Cir. 2001) ("It is ordinary tort law that applies to non-immune foreign governments . . ."); *Joseph v. Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987) (applying California law of *respondeat superior* to tort claims). In fact, it has hard to imagine how it could be otherwise, because most of the types of claims routinely litigated under the FSIA exceptions to immunity (such as breach of contract under the commercial activities exception, 28 U.S.C. § 1605(a)(2)) do not have a corresponding "federal cause of action" that the D.C. Circuit held to be required in *Acree*.

The United States has likewise acknowledged that state or foreign law may provide a cause of action in FSIA cases. In an *amicus* brief filed earlier this year in the D.C. Circuit, the United States stated that, under the FSIA, "the foreign state ordinarily may be held liable according to state or local foreign laws that apply to private individuals generally." Brief for Amicus Curiae the United States of America in Support of Plaintiffs-Appellees in *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, No. 03-7117, 2004 WL 502018 (Mar. 9, 2004) at *11. In that case, the United States urged the court to "allow the plaintiffs here an opportunity to show in the district court whether state or local foreign law would provide them a cause of action against a private individual in similar circumstances." *Id.* at *12-13.[1]

1. In *Kilburn*, the D.C. Circuit declined to decide the cause of action issue as it did not consider the issue properly pendent to the interlocutory appeal before it. *Kilburn v. Socialist People's Libyan* (Cont'd)

Acree is therefore inconsistent with the Court's decision in *First National City Bank* and inconsistent with the position of every other circuit to have considered the issue. It reflects a significant departure from well-established principles concerning the applicable sources of law under the FSIA. If left unresolved by the Court, the decision in *Acree* will breed uncertainty as to the legal basis for any type of foreign sovereign litigation.

Moreover, with respect to victims of terror, the D.C. Circuit has created, in effect, a different standard of pleading – a standard that strips out the state law causes of action that are the foundation of FSIA litigation and leaves the exception to immunity for acts of torture a hollowed-out shell. If left uncorrected by this Court, the decision in *Acree* will create significant confusion within the D.C. Circuit and among other Circuit Courts of Appeals concerning the ability of U.S. citizens to seek redress in U.S. courts for acts of terror

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(Cont'd)

Arab Jamahiriya, 376 F.3d 1123, 1134-36 (D.C. Cir. 2004); *see also Price v. Socialist People's Libyan Arab Jamahiriya*, 2004 U.S. App. LEXIS 24357, at *17-*20 (D.C. Cir. Nov. 23, 2004) (declining to exercise pendent appellate jurisdiction to address district court's denial of motion to dismiss for failure to state a cause of action). The court did observe, however, that the plaintiff in the underlying case had asserted multiple causes of action under state common law relating, *inter alia*, to battery, assault, torture, and intentional infliction of emotional distress. *Kilburn*, 376 F.3d at 1125; *Price*, 2004 U.S. App. LEXIS 24357, at *19. The court also observed that its decision in *Cicippio-Puleo* had declined to decide whether terrorism victims invoking § 1605(a)(7) have other causes of action. *Kilburn*, 376 F.3d at 1133. In *Price*, as in *Kilburn*, the court adverted to state common law as a basis for cause of action before the district court. *See Price*, 2004 U.S. App. LEXIS 24357, at *19; *Kilburn*, 376 F.3d at 11.

committed against them. The Court should not allow this uncertainty to remain unresolved at a time when the United States is engaged in a global war on terror, in which the use of civil litigation against state sponsors of terror is a vital tool and one that is critically important to individual victims of terror.

B. The D.C. Circuit's Decision in *Acree* Is Contrary to the Court's Decision in *Sosa*

After the D.C. Circuit issued its decision in *Acree*, but before it ruled on petitioners' petition for rehearing en banc, the Supreme Court issued its decision in *Sosa v. Alvarez-Machain*, 542 U.S. __, 124 S. Ct. 2739 (2004). The *Sosa* decision refutes the holding of the D.C. Circuit in *Acree* for two reasons. First, contrary to D.C. Circuit's holding in *Acree*, it establishes that the common law, including state common law, *can* serve as the source of a federal cause of action if there is reason to conclude that Congress intended federal courts to apply common law causes of action as substantive rules of liability. Second, *Sosa* strongly suggests that petitioners have an independent federal cause of action for torture which violates well-defined and widely-accepted obligations under the law of nations.

Because the D.C. Circuit did not have the benefit of the Court's decision in *Sosa* at the time that it issued its decision in *Acree*, petitioners respectfully suggest that it would be appropriate for the Court to grant the petition for certiorari, vacate the underlying decision, and remand for reconsideration of all available causes of action in light of *Sosa*.

1. *Sosa* Confirms that the Common Law May Supply Causes of Action Under Federal Statutes

The critical premise of the D.C. Circuit's decision in *Acree* is that "generic common law cannot be the *source* of a federal cause of action." *Acree*, 370 F.3d at 59. It was on this basis, and this basis alone, that the D.C. Circuit rejected petitioners' argument that the state common law torts considered by the district court provided a sufficient legal basis for the judgment. *Id.* ("[T]here is no support for the proposition that generic common law itself may furnish the cause of action. Rather, as in any case, a plaintiff proceeding under the FSIA must identify a particular cause of action arising out of a specific source of law.")

The reasoning of the *Acree* court is indistinguishable from the reasoning that the Court rejected last term in *Sosa*. At issue in *Sosa* was the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 124 S. Ct. at 2770. In response to the contention that this was merely a grant of jurisdiction, and not the conferral of a right of action, the Court observed that "[i]t would have been passing strange for [Congress] to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action." *Id.* at 2758. While agreeing with petitioner and the United States that the ATS did not *itself* create a new cause of action for torts committed in violation of international law, the Court held that Congress conferred this jurisdiction upon the federal courts "on the understanding that the common law would provide a cause of action" for

violations of international law that give rise to personal liability. *Id.* at 2743-44.

The parallels to the FSIA could not be more direct. 28 U.S.C. § 1330 provides that "[t]he district courts shall have original jurisdiction . . . of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." As with the ATS, it would have been "passing strange" for Congress to confer this jurisdiction upon federal courts, including for cases in which "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture," 28 U.S.C. § 1605(a)(7), and yet to have this grant of jurisdiction lie fallow until Congress should later enact a specific cause of action for acts of torture.

The implausibility of this interpretation is underscored by the fact that § 1606 provides, as discussed above, that a foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances." Unlike the ATS – which was expressed solely in jurisdictional terms – the FSIA specifically delineates the range of claims that may be asserted against a non-immune foreign sovereign, *i.e.*, those that could be asserted against "a private individual in like circumstances." The Court's decision in *Sosa* therefore applies *a fortiori* to a proper interpretation of § 1605(a)(7). Congress could not have intended that federal courts would exercise jurisdiction over claims against state sponsors of terrorism for acts of torture, and yet not have expected that relevant causes of action would be available. The answer, as in *Sosa*, is that Congress understood that other sources of law, including state common law, would supply the causes

of action. The Court has already held as much in *First National City Bank.*[2]

Unlike *Sosa*, it is not necessary to delve into the early years of the Republic to ascertain that Congress did not intend § 1605(a)(7) to lie fallow. Both the plain language of the statute and its legislative history make clear that Congress intended § 1605(a)(7) to allow U.S. citizens to seek restitution in federal courts against state sponsors of terrorism. That expectation is manifest in the fact that § 1605(a)(7), unlike any other element of the FSIA, has its own limitations period,

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2. In its insistence that "generic common law cannot be the *source* of a federal cause of action," *Acree*, 370 F.3d at 59, the court of appeals appears to have confused the question of whether petitioners had valid *causes of action* with the question of which *substantive rules of liability* federal courts should apply in FSIA cases. In *First National City Bank*, the Court did not address *which* body of state law federal courts should apply under the FSIA to determine whether a private individual would be liable in like circumstances. Some circuits have applied the law of the forum, including its conflicts principles. *See, e.g., Barkanic v. Gen. Admin. of Civil Aviation of People's Republic of China*, 923 F.2d 957, 959-60 (2d Cir. 1991). Other circuits have applied general principles of liability, such as those set forth in the *Restatements*, without regard to the law of a particular jurisdiction. Courts in the D.C. Circuit have taken this approach in cases arising under § 1605(a)(7), *see, e.g., Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 47-50 (D.D.C. 2001), *aff'd sub nom. Bettis v. Islamic Republic of Iran*, 315 F.3d 325 (D.C. Cir. 2003); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000), and it was on this basis that the district court determined liability in this case. The court of appeals' statement that "a plaintiff proceeding under the FSIA must identify a particular cause of action arising out of a specific source of law," *Acree*, 370 F.3d at 59, was relevant, if at all, to this basic *choice of law* question, not to the question of whether petitioners had a valid cause of action under *any* body of law, which they clearly did.

which applies to any "cause of action" maintained under that exception to immunity. 28 U.S.C. § 1605(f). In addition, and again unlike any other provision of the FSIA, § 1605(a)(7) has its own retroactivity provision, which provides that the terrorism exception to immunity "shall apply to any *cause of action* arising before, on, or after the date of the enactment of this Act." Pub. L. No. 104-132, § 221(c) (emphasis added). Clearly, Congress believed that there *were* causes of action available for victims of state-sponsored terror. Those causes of action would include, at a minimum, those state law causes of action that would render a private individual liable in like circumstances.[3]

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3. That Congress expected causes of action to be available under § 1605(a)(7) is further confirmed by the legislative history. In its report on the original version of the state-sponsored terrorism amendment, the House Judiciary Committee stated that the purpose of the amendment was "to allow U.S. citizens who have been subjected to" the terrorist actions enumerated in the exception "to maintain a *federal cause of action* for damages against the foreign government involved." H.R. Rep. No. 103-702, at 2 (1994) (emphasis added) ("Summary and Purpose" of amendments; see also the Dissenting Views at 12 further acknowledging this point) (Pet. App. I). In a subsequent report on the amendment, the Committee emphasized that it would "give American citizens an important economic and financial weapon against these outlaw states." H.R. Rep. No. 104-383, at 62 (1995) (Pet. App. J). The Judiciary Committee's understanding of the effect of § 1605(a)(7) was wholly consistent with that of the amendment's principal sponsors, Senator Arlen Specter and Congressman Jon Fox, both of whom expressed the view that it would give American victims a remedy against state sponsors of terror. *See, e.g.*, 139 Cong. Rec. S4925 (1993) (statement of Senator Specter) ("This legislation would let foreign sovereigns know that states which practice terrorism or actively support it will not do so without consequence" by "allow[ing] U.S. citizens . . . to protect their interests and seek compensation for the harm done to

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The ATS and § 1605(a)(7) of the FSIA are kindred provisions of U.S. law, even though their enactment into law is separated by over 200 years. The ATS allows aliens to bring suit in U.S. courts for torts committed in violation of international law; section 1605(a)(7) allows U.S. citizens to bring suit in U.S. courts for specified actions which are themselves violations of international law and which are of a tortious nature. Together, they are the legal foundation for much of the litigation that takes place in U.S. courts relating to the enforcement and vindication of fundamental human rights and universally accepted principles of international law. The Court should therefore grant the petition in order to clarify the sources of law under § 1605(a)(7) as it has done for the ATS in *Sosa*. Alternatively, it should grant, vacate, and remand to the D.C. Circuit with instructions for the court to reconsider its interpretation of § 1605(a)(7) in light of *Sosa*.

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them.") (Pet. App. K); 142 Cong. Rec. H2141-42 (1996) (statement of Congressman Fox) ("I introduced . . . the State-Sponsored Terrorism Responsibility Act to allow American victims to have a means of redress in the courts.") (Pet. App. L). *Accord* 142 Cong. Rec. H2132 (1996) (statement of Congresswoman Ros-Lehtinen) ("This bill . . . allow[s] victims . . . to seek redress for these crimes from the governments that sponsor these atrocities.") (Pet. App. M); *Id.* at H2185 (statement of Congressman Hyde) (noting that the Amendment would give victims the ability "to sue terrorist countries and perpetrators of terrorist acts in this country and get a judgment.") (Pet. App. N).

2. *Sosa* Further Suggests that Petitioners Have an Independent Federal Cause of Action for Violations of the Law of Nations

The Court's decision in *Sosa* is equally significant because it strongly suggests that petitioners have a cause of action under federal common law for acts of torture. If correct, this cause of action would provide yet another basis for the causes of action that the D.C. Circuit incorrectly found to be lacking in *Acree*.

In *Sosa*, the Court considered what standards federal courts should apply to determine whether a particular claim for a violation of an international legal norm is cognizable under federal common law. Examining this issue under the ATS, the Court held that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted." 124 S. Ct. at 2765. The Court endorsed the view that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." *Id.* at 2766, quoting *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994).

It is clear that state-sponsored torture is a violation of specific and universally accepted international legal norms. In *Sosa*, the Court endorsed the conclusion of the Second Circuit that "for purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind." *Id.*, *quoting*

Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).[4] Justice Breyer, concurring in *Sosa*, observed that certain behavior is not only "universally condemned" but is also recognized as subject to universal jurisdiction to punish. *Id.* at 2783. "That subset," Justice Breyer concluded, "includes torture, genocide, crimes against humanity, and war crimes."[5] *Id.*

State-sponsored torture is therefore actionable under federal common law as a violation of clearly established international legal norms. As a result, even if the D.C. Circuit were correct in its interpretation of § 1605(a)(7) as it relates to state law causes of action (and it is not), it is clear that a court exercising jurisdiction under § 1605(a)(7) may adjudicate claims for money damages arising from acts of torture as a matter of federal common law.

II. The D.C. Circuit Incorrectly Assumed that the Flatow Amendment to the FSIA Does Not Create a Cause of Action Against Foreign States for Acts of Terror

Underlying the D.C. Circuit's decision in *Acree* is its conclusion in *Cicippio-Puleo* that neither § 1605(a)(7) nor the Flatow Amendment, whether considered separately or together, creates a private cause of action against foreign

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4. The Second Circuit's decision in *Filartiga* discusses at length the sources of customary international law that support its conclusion that "official torture is now prohibited by the law of nations." *Filartiga*, 630 F.2d at 884.

5. Justice Breyer further observed that the universal criminal jurisdiction that exists to prosecute these offenses "necessarily contemplates a significant degree of civil tort recovery as well." 124 S. Ct. at 2783.

states for acts of torture. For the reasons set forth in Part I above, the D.C. Circuit's conclusion in *Cicippio-Puleo* that § 1605(a)(7) does not create an independent cause of action may or may not be technically accurate, but is ultimately irrelevant. This is because causes of action against foreign states relating to acts of torture are available, at a minimum, under state law per § 1606 of the FSIA or as a matter of federal common law.

In addition, however, the district court correctly found that petitioners had available a cause of action under the Flatow Amendment to the FSIA, 28 U.S.C. § 1605 note. The Flatow Amendment provides that:

> [A]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [§ 1605(a)(7)] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in [§ 1605(a)(7)].

28 U.S.C. § 1605 note. In *Cicippio-Puleo*, the D.C. Circuit interpreted this provision as creating "a cause of action against officials, employees, and agents" of foreign states acting "in their *personal capacities*." 353 F.3d at 1036. It was on the basis of this decision that the D.C. Circuit held in *Acree* that the Flatow Amendment did not provide a cause of action for petitioners' claims against Iraq.

The D.C. Circuit's interpretation of the Flatow Amendment is simply wrong. The Flatow Amendment is expressly limited to an "official, employee, or agent" of a terrorist state "acting *within the scope of his or her office, employment, or agency* . . ." 28 U.S.C. § 1605 note (emphasis added). This is the normal language that Congress would employ to create a cause of action that runs against *the terrorist state* under ordinary principles of *respondeat superior.* States are only capable of acting through their officials, employees, and agents; there is no distinct category of "state actions" separate and apart from the actions of the state's officials, employees, and agents acting within the scope of their authority.[6]

The fact that the Flatow Amendment does not create a cause of action running directly against the foreign state is hardly surprising, in light of the structure of the FSIA and the basic legislative practice with respect to claims against sovereigns. Congress does not ordinarily create causes of

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6. Moreover, the D.C. Circuit's interpretation of the Flatow Amendment is inherently contradictory, in that the amendment is expressly limited to an individual "acting within the scope of his or her office, employment, or agency," and yet the D.C. Circuit interprets the amendment as creating a cause of action solely against individuals acting in their *personal* capacities. The D.C. Circuit did not explain what it meant by "personal capacities." Surely the Flatow Amendment was not meant to address the situation in which an agent of a terrorist state, while acting within the scope of his or her agency, goes off on an unauthorized lark and engages in acts of torture, extrajudicial killing, aircraft sabotage, or hostage taking. These acts are cognizable under the Flatow Amendment precisely because they are the kinds of acts that a terrorist state might direct its employees or agents to commit. That being the case, it is beyond doubt that the terrorist state would be liable under normal principles of *respondeat superior* for the acts of its employees or agents.

action running directly against foreign states or, indeed, against the United States itself. Instead, as described above, § 1606 of the FSIA makes a foreign state liable to the "same extent as a private individual in like circumstances." Not coincidentally, this is also how the Federal Tort Claims Act makes the United States liable for the tortious actions of its officials, employees, or agents.[7] Under this structure, it is unnecessary for a particular cause of action to run directly against the foreign state (under the FSIA) or the United States (under the FTCA) in order to assert that cause of action against the sovereign. Thus, when Congress creates a cause of action against an "official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency," that cause of action is available for claims against the state itself.[8]

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7. 28 U.S.C. § 2674 provides in relevant part that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ." The most significant difference between § 1606 of the FSIA and § 2674 of the FTCA is that the FTCA has an explicit choice of law provision (the place where the act or omission occurred, *see Richards v. United States*, 369 U.S. 1 (1962)), whereas the FSIA does not specify which body of law is to govern. Federal courts have generally applied the law of the forum, including its conflicts principles, to determine the substantive law that governs in an FSIA case. *See, e.g., Barkanic v. Gen. Admin. of Civil Aviation of People's Republic of China*, 923 F.2d 957, 959-60 (2d Cir. 1991).

8. Moreover, *Cicippio-Puleo* overlooks the fact that Congress had *already* created a cause of action against individuals for acts of torture. The Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note ("TVPA"), establishes the liability of "An *individual* who, under actual or apparent authority, or color of law, of any foreign nation" (Cont'd)

III. The D.C. Circuit's Error Cannot Be Corrected in Other Circuits Because of the Venue Provision of the FSIA

The D.C. Circuit's decision in *Acree* is contrary to the Court's decisions in *First National City Bank* and *Sosa*, contrary to the plain meaning of § 1605(a)(7), and contrary to the clear intent of Congress to make federal courts available for victims of state-sponsored terror. Together with its equally erroneous interpretation of the Flatow Amendment in *Cicippio-Puleo*, the D.C. Circuit has evinced an unremitting hostility toward civil litigation against state sponsors of terror, wholly out of step with the plain language of the FSIA and the clear intent of Congress. By ignoring the clear availability of state law causes of action under § 1606, by grossly misconstruing the meaning and purpose of the Flatow Amendment, and by not examining the availability of causes of action under federal common law for violations of universally accepted international legal norms, the D.C. Circuit has made it nearly impossible – if not completely impossible – to bring suit against state sponsors of terrorism in the D.C. Circuit.

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engages in acts of torture. (Emphasis added.) The legislative history of this provision states that the statute "uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued." Report of the Committee on the Judiciary to accompany S. 313, 102nd Cong., 1st Sess. (1991) at 7. The TVPA makes clear that Congress knows how to limit liability to individuals, and the language of the Flatow Amendment ("official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency") is inconsistent with such an intent.

The effect that the D.C. Circuit's erroneous interpretation of § 1605(a)(7) will have on victims of state-sponsored terror is gravely compounded by the venue provision of the FSIA.[9] Under this provision, the D.C. Circuit is effectively the mandatory venue for cases arising under § 1605(a)(7); the only instances in which venue is proper outside the D.C. Circuit is where the injury occurs within the judicial district or where the suit is solely against an agency or instrumentality of a state sponsor of terror. Of the approximately 45 cases that have been decided under the jurisdiction conferred by § 1605(a)(7), petitioners are only aware of one such case.[10]

The Court should grant the petition not only because of the grave importance of the errors that the D.C. Circuit has committed, but also because its erroneous interpretation of § 1605(a)(7), if left uncorrected by this Court, will pose a serious and potentially insurmountable obstacle for future

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9. In relevant part, a civil action against a foreign state may be brought (1) "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;" (2) "in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality;" or (3) for all other cases, in the D.C. Circuit. 28 U.S.C. § 1391(f).

10. *See Alejandre v. Republic of Cuba*, 42 F. Supp. 2d 1317 (S.D. Fla.), *vacated by* 183 F.3d 1277 (11th Cir. 1999). Venue was proper in that case because the injury at issue – the downing of a private airplane by the Government of Cuba – occurred on the high seas within 100 miles of the United States District Court for the Southern District of Florida. The Second Circuit has decided a case under § 1605(a)(7), *see Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998), although it is unclear why venue was proper in that case.

victims of terror whose only option for redress is to pursue civil litigation in the D.C. Circuit. It is therefore particularly important that the Court not allow the errors in the *Acree* decision to escape review.

IV. The Manner in Which the D.C. Circuit Decided This Case Warrants an Exercise of the Court's Supervisory Power

The D.C. Circuit decided the case below in a manner wholly out of keeping with the severity of the abuses committed against American POWs, the landmark nature of the district court's judgment, and the exceptional importance of the issue decided by the court of appeals.

The Iraqi defendants waived their right to assert the lack of a valid cause of action by not appearing in the district court. *See* Fed. R. Civ. P. 12(h)(2). When the United States moved to intervene following the entry of judgment, it challenged the jurisdiction of the district court, but did not claim that petitioners lacked a valid cause of action. Moreover, in its appeal to the D.C. Circuit, the United States noted the court's opinion in *Cicippio-Puleo*, but did not suggest that the court of appeals should vacate the judgment for lack of a valid cause of action. In light of the position that it has taken in other cases, including the *Kilburn* appeal, it is reasonable to surmise that the United States recognized that (1) petitioners had valid causes of action against the Iraqi defendants in light of the fact that a private individual would be liable under like circumstances; and (2) in any event, any motion relating to the unavailability of a cause of action was no longer timely.

Petitioners recognize that there may be exceptional cases in which it is appropriate for a court of appeals to resolve a case based upon a waived non-jurisdictional issue that no party has raised on appeal. However, as the D.C. Circuit has recognized, "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *see also In re Cheney*, 334 F.3d 1096, 1107-08 (D.C. Cir. 2003), *vacated and remanded sub nom. Cheney v. U.S. Dist. Court for Dist. of Columbia*, 124 S. Ct. 2576 (2004). Thus, where a party "has made no attempt to address [an] issue," the Court "will not remedy the defect, especially where . . . 'important questions of far-reaching significance' are involved." *Carducci*, 714 F.2d at 177 (quoting *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 7 (D.C. Cir. 1982)).

In this case, the court of appeals vacated a $959 million judgment based on a waived non-jurisdictional defense that the parties had not briefed and that the court first raised with the parties less than forty-eight hours before oral argument. The single authority that the court of appeals relied upon for this extraordinary action was inapposite.[11] Moreover, the court's stated rationale for this action – that the case involved a judgment "against a foreign government whose present and future stability has become a central preoccupation of the United States' foreign policy," 370 F.3d at 58 – reveals that its decision to vacate the judgment awarded to petitioners was nothing less than a judicial foray into foreign policy.

11. That decision, *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 (D.C. Cir. 1992) concerns the circumstances in which the court of appeals should consider an issue raised for the first time on appeal *by a party to the appeal.*

Once set on this path, the court of appeals proceeded to disregard the record of the case and its own precedents, including *Cicippio-Puleo*. Petitioners' counsel explained to the court at oral argument that petitioners had asserted causes of action other than a cause of action under § 1605(a)(7) and the Flatow Amendment, and that the district court had made explicit findings with respect to these alternative causes of action. In *Cicippio-Puleo*, by contrast, the district court had already considered *and rejected* the common law torts that the plaintiffs in that case had pled under state law, on the grounds that they had not satisfied the requisite elements of those torts. *Cicippio-Puleo*, 353 F.3d at 1029-30. The issue in *Cicippio-Puleo* was therefore whether § 1605(a)(7) and the Flatow Amendment create a cause of action in the *absence* of a state law cause of action under 28 U.S.C. § 1606. Regardless of whether the court's resolution of that issue was correct, the fact is that there were alternative state law causes of action available in this case, unlike in *Cicippio-Puleo*. At a minimum, the court of appeals should have remanded to the district court for confirmation of this fact. Instead, the court of appeals *sua sponte* vacated the judgment in its apparent belief that absolving Iraq of liability for acts of torture would advance U.S. foreign policy interests.[12]

Petitioners submit that this was a serious abuse of discretion by the court of appeals, and one that warrants an exercise of the Court's supervisory power. The D.C. Circuit not only departed from the clear holdings of this Court and the opinions of other circuit courts of appeals, but did so in

12. *Cf. Dames & Moore v. Regan*, 453 U.S. 654, 690 (1981) (taking of private claims to further foreign policy goals is subject to Just Compensation Clause); *Gray v. United States*, 21 Ct. Cl. 340, 392-93 (1886) ("the citizen whose property is thus sacrificed for the safety and welfare of his country . . . has a right to compensation.").

a way that effectively cured the Iraqi defendants of their default, presented petitioners with no opportunity to brief the issues, and led the court to undertake an inadequate and erroneous examination of a critical issue under the FSIA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED JUNE 4, 2004

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5232

CLIFFORD ACREE, COLONEL, ET AL.,

APPELLEES

v.

REPUBLIC OF IRAQ, ET AL.,
UNITED STATES OF AMERICA,

APPELLANT

April 7, 2004, Argued
June 4, 2004, Decided

OPINION:

EDWARDS, *Circuit Judge*: Appellees in this case are 17 American soldiers, joined by their close family members, who were captured and held as prisoners of war by the Iraqi Government while serving in the Gulf War in early 1991. Appellees brought suit in the District Court under the terrorism exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(7) (2000), against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his official capacity as President of Iraq

(collectively "Iraq"), seeking compensatory and punitive damages for the horrific acts of torture they suffered during their captivity. After Iraq failed to appear, the District Court examined appellees' evidentiary submissions and entered judgment in their favor. The District Court awarded damages against Iraq totaling over $ 959 million. *See Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003) ("*Acree I*").

Two weeks after the District Court entered its judgment for appellees, the United States filed a motion to intervene for the purpose of contesting the District Court's subject matter jurisdiction. The United States argued that recently enacted provisions of the Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (2003), made the terrorism exception to the FSIA inapplicable to Iraq and thereby stripped the District Court of its jurisdiction over appellees' lawsuit. The District Court denied the United States' motion to intervene as untimely, *see Acree v. Republic of Iraq*, 276 F. Supp. 2d 95 (D.D.C. 2003) ("*Acree II*"), and the United States now appeals.

We hold that the District Court abused its discretion in finding the United States' motion to intervene to be untimely and erred in denying that motion. The United States possesses weighty foreign policy interests that are clearly threatened by the entry of judgment for appellees in this case. Although the United States filed its motion after the District Court had entered its judgment, appellees have asserted no prejudice arising from the intervention. On the merits of the United States' jurisdictional challenge, we hold that the District Court properly exercised jurisdiction in appellees' lawsuit. Although it presents a close question of statutory

interpretation, we conclude that the disputed language in the emergency supplemental appropriations act does not encompass the terrorism exception to the FSIA.

We nevertheless conclude that the District Court's judgment in favor of appellees must be vacated and their lawsuit dismissed for failure to state a cause of action. The District Court's judgment against Iraq rests solely on causes of action purportedly arising under the terrorism exception and the Flatow Amendment to the FSIA. Neither appellees' complaint, nor their submissions to this court, nor the District Court's decision in their favor offers any other coherent alternative causes of action in support of appellees' claims against Iraq. Our recent decision in *Cicippio-Puleo v. Islamic Republic of Iran*, 359 U.S. App. D.C. 299, 353 F.3d 1024 (D.C. Cir. 2004) ("*Cicippio*"), makes it plain that the terrorism exception to the FSIA is merely a jurisdictional provision and does not provide a cause of action against foreign states. *Cicippio* also holds that the Flatow Amendment to the FSIA, which provides a cause of action against an "official, employee, or agent of a foreign state," 28 U.S.C. § 1605 note (2000), does not afford a cause of action against a foreign state itself. We are therefore constrained to vacate the judgment of the District Court and dismiss appellees' suit for failure to state a cause of action.

Appendix A

I. BACKGROUND

A. The POW Lawsuit

The facts in this case are undisputed. While serving in the Gulf War following the Iraqi invasion of Kuwait, Colonel Clifford Acree and 16 other American soldiers who are appellees in this case were captured and held as prisoners of war in Kuwait and the Republic of Iraq between January and March 1991. On April 4, 2002, these POWs and their close family members filed a complaint in the District Court against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his official capacity as President of Iraq, for personal injuries caused to them and their family members as a result of their treatment by Iraq. In their complaint, the POW plaintiffs described brutal and inhumane acts of physical and psychological torture suffered during their captivity, including severe beatings, starvation, mock executions, dark and unsanitary living conditions, and other violent and shocking acts. By these alleged atrocities, the plaintiffs' captors created a "climate [of] humiliation and degradation," in which the POWs "lived in constant fear of death and torture." Compl. P 5, *reprinted in* Joint Appendix ("J.A.") 35.

Jurisdiction in the plaintiffs' lawsuit was based on the terrorism exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7). Under the FSIA, foreign states enjoy immunity from suit in American courts, unless that immunity has been waived or abrogated pursuant to an exception enumerated in the FSIA. *See* 28 U.S.C. § 1604; *see also* 28 U.S.C. § 1330(a) (limiting the district courts' jurisdiction

over suits against foreign states to cases in which the foreign state is not entitled to immunity under the FSIA). Section 1605(a)(7), added to the FSIA in 1996, creates an exception to foreign sovereign immunity in civil suits "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture" or other terrorist acts. 28 U.S.C. § 1605(a)(7). This exception applies only if the defendant foreign state was designated as a state sponsor of terrorism at the time the alleged acts of torture occurred. *See* 28 U.S.C. § 1605(a)(7)(A). Pursuant to § 6(j) of the Export Administration Act, 50 U.S.C. App. § 2405(j) (1988 & Supp. I 1989), the Republic of Iraq was designated as a state sponsor of terrorism on September 13, 1990, shortly after the Iraqi invasion of Kuwait and before the events took place that formed the basis of the plaintiffs' claims. *See* 55 Fed. Reg. 37,793 (Sep. 13, 1990). Iraq was therefore amenable to suit in federal court under the FSIA at the time the plaintiffs commenced their lawsuit.

Citing several decisions of the District Court, the plaintiffs - appellees herein - premised their cause of action on § 1605(a)(7), as amended by the so-called "Flatow Amendment," which was adopted shortly after § 1605(a)(7) was added to the FSIA in 1996. *See* Compl. P 596, J.A. 143. The Flatow Amendment provides that:

> An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused

> by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [§ 1605(a)(7)] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in [§ 1605(a)(7)].

28 U.S.C. § 1605 note. Appellees alleged that the acts of torture set forth in their complaint constituted "traditional torts of assault, battery and intentional infliction of emotional distress," Compl. P 597, J.A. 143, and requested compensatory and punitive damages for each of the POW plaintiffs and their family members.

Appellees effected proper service of process through diplomatic channels, pursuant to 28 U.S.C. § 1608. The Iraqi defendants failed to appear, and the Clerk of the District Court accordingly entered default against the defendants on September 25, 2002. On March 31, 2003, appellees submitted evidence to support their assertion of liability and claim for damages. These submissions provided further details regarding the factual basis of appellees' claims and again asserted the existence of a cause of action based on § 1605(a)(7), as amended by the Flatow Amendment, for assault, battery, and intentional infliction of emotional distress. *See* Pls.' Proposed Findings of Fact and Conclusions of Law at 80-90.

On July 7, 2003, the District Court entered final judgment in favor of appellees. *See Acree I*, 271 F. Supp. 2d 179. The District Court held that "suits brought under § 1605(a)(7)

may be based on conventional common law torts." *Id.* at 215. Based on extensive findings of fact regarding the specific injuries suffered by each plaintiff, the District Court awarded compensatory and punitive damages to all of the POW plaintiffs and their family members totaling over $ 959 million. *Id.* at 224-25.

B. Legal and Military Developments in Iraq

As the proceedings in the District Court were running their course, the legal and military situation in Iraq was changing rapidly. In connection with Iraq's designation as a state sponsor of terrorism in September 1990, Congress had passed various statutes imposing sanctions on Iraq and prohibiting the United States Government and private parties from sending assistance to Iraq or conducting business or trade with Iraq. Most notably, Congress enacted the Iraq Sanctions Act of 1990, which condemned the Iraqi invasion of Kuwait and provided for the maintenance of a trade embargo and economic sanctions against Iraq. *See* Pub. L. No. 101-513, § § 586-586J, 104 Stat. 1979, 2047-55 (1990) (codified at 50 U.S.C. § 1701 note (2000)) ("ISA"). These provisions required that all assistance, exports, loans, credits, insurance, or other guarantees be denied to Iraq, with exceptions for limited humanitarian relief. Section 586F(c) of the ISA also required full enforcement against Iraq of § 620A of the Foreign Assistance Act of 1961, which prohibits the grant of any assistance to any country determined by the Secretary of State to have "repeatedly provided support for acts of international terrorism," Pub. L. No. 87-195, § 620A, *as added* Pub. L. No. 94-329, § 303, 90 Stat. 729, 753 (1976) (codified as amended at 22 U.S.C. § 2371) ("FAA"). Along

with the FAA, the ISA required that several other enumerated provisions of law be fully enforced against Iraq, as well as "all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism." ISA § 586F(c), 104 Stat. 1979, 2051.

Both the Iraq Sanctions Act and the Foreign Assistance Act provide for rescission of the prohibitions they impose on aid to Iraq and other designated states, but only after the President certifies to Congress that there has been a fundamental change in the government or policies of the designated state and that the leadership is no longer supporting acts of terrorism. *See* ISA § 586H, 104 Stat. 1979, 2052-53; FAA, 22 U.S.C. § 2371(c) (2000). A similar certification is required to rescind the Secretary of State's determination under the Export Administration Act that Iraq is a country that has repeatedly provided support for acts of international terrorism. *See* 50 U.S.C. App. § 2405(j)(4) (2000).

Shortly after the commencement of the most recent military action against Iraq in 2003, which resulted in the ouster of Saddam Hussein's regime, the United States' policy toward Iraq changed to reconstructing Iraq's government and rebuilding the country's infrastructure. In furtherance of these new objectives, Congress took several steps to eliminate restrictions on the ability of the United States Government and private parties to provide assistance to or conduct business with Iraq. In April 2003, Congress enacted the Emergency Wartime Supplemental Appropriations Act ("EWSAA" or "Act"), which appropriated additional funding for military operations in Iraq, homeland security efforts in

the United States, and bilateral economic assistance to America's allies in the war in Iraq. *See* Pub. L. No. 108-11, 117 Stat. 559 (2003). The bulk of the $ 78.5 billion appropriated in this Act was allocated to national defense activities. In addition, the Act appropriated nearly $2.5 billion for a new Iraq Relief and Reconstruction Fund, to be used for the development of physical and government infrastructure and humanitarian activities in Iraq. *See* H.R. CONF. REP. No. 108-76, at 70-72 (2003). The Act provided that assistance to Iraq under the Iraq Relief and Reconstruction Fund and other aid programs could be provided "notwithstanding any other provision of law." *See* EWSAA § 1502, 117 Stat. 559, 578.

Of particular relevance to this appeal, § 1503 of the EWSAA authorized the President to "suspend the application of any provision of the Iraq Sanctions Act of 1990." EWSAA § 1503, 117 Stat. 559, 579. Section 1503 "provided further, that the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism." *Id.* The suspension of these provisions would permit American assistance to Iraq to proceed without awaiting completion of the lengthy certification process required to rescind the Secretary of State's previous determination as to Iraq's status as a sponsor of terrorism.

On May 7, 2003, President Bush carried out the authority granted in § 1503 of the EWSAA by issuing Presidential Determination No. 2003-23, which "made inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 . . . and any other provision of law that applies to

countries that have supported terrorism." Presidential Determination No. 2003-23 of May 7, 2003, 68 Fed. Reg. 26,459 (May 16, 2003). In a message to Congress delivered on May 22, 2003, President Bush explained the need to protect Iraqi assets from attachment, judgment, or other judicial process, and stated his view that the May 7 Determination applied to, *inter alia*, the terrorism exception to the FSIA, 28 U.S.C. § 1605(a)(7). *See* Message to the Congress Reporting the Declaration of a National Emergency With Respect to the Development Fund for Iraq, 39 WEEKLY COMP. PRES. DOC. 647, 647-48 (May 22, 2003).

C. The United States' Motion to Intervene

On July 21, 2003, two weeks after the District Court entered judgment for appellees, the United States moved to intervene for the sole purpose of contesting the subject matter jurisdiction of the District Court. This challenge rested on legal developments that had occurred in the wake of the United States' invasion of Iraq in March 2003. The United States argued that § 1605(a)(7) is a "provision of law that applies to countries that have supported terrorism" within the meaning of § 1503 of the EWSAA, as implemented by the May 7 Presidential Determination, and was therefore made inapplicable to Iraq by operation of those provisions. The District Court, the Government argued, was therefore divested of jurisdiction over appellees' lawsuit as of May 7, 2003, two months prior to the entry of judgment against the Iraqi defendants.

On August 6, 2003, the District Court denied the Government's motion to intervene as untimely. *See Acree II*,

276 F. Supp. 2d at 98-99. The District Court noted that the United States had waited 75 days after the Presidential Determination to file its motion, and the court was particularly reluctant to permit the Government to intervene after appellees' case had proceeded to final judgment. *See id.* The District Court further held that, even if the United States' motion was not untimely, appellees' lawsuit did not threaten to impair any cognizable interest of the United States and that allowing the Government to intervene at that late stage would cause undue delay and prejudice to the parties. *See id.* at 99-102. Finally, the District Court considered its own subject matter jurisdiction and concluded that it retained jurisdiction under the FSIA, despite the EWSAA and the Presidential Determination. *See id.* at 100-01. On August 22, 2003, the United States filed this appeal of the District Court's decision.

D. Related Developments

Just before the United States moved to intervene, appellees filed a second suit in the District Court against the Secretary of the Treasury, seeking to satisfy their newly won judgment against Iraq by attaching funds from seized Iraqi bank accounts, pursuant to the Terrorism Risk Insurance Act of 2002 ("TRIA"). *See Acree v. Snow*, 276 F. Supp. 2d 31 (D.D.C. 2003). Section 201(a) of the TRIA provides that a person who has obtained a judgment against a foreign state designated as a state sponsor of terrorism may seek to attach the blocked assets of that state in satisfaction of an award of compensatory damages based on an act of terrorism. *See* Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (2002) (codified at 28 U.S.C. § 1610 note). Although appellees initially

prevailed in obtaining a temporary restraining order, precluding the Secretary of the Treasury from spending down the United States' seized Iraqi assets, the District Court ultimately awarded summary judgment to the United States. *See Acree v. Snow*, 276 F. Supp. 2d at 33. The District Court held that § 1503 of the EWSAA, as implemented by the May 7 Determination, made the TRIA inapplicable to Iraq and therefore unavailable to appellees as a mechanism for satisfying their judgment. *See id.* at 32-33.

This court affirmed the decision of the District Court by judgment. *See Acree v. Snow*, 2003 U.S. Dist. LEXIS 27789, No. 03-5195 (D.C. Cir. Oct. 7, 2003). The court did not address the applicability or effect of the EWSAA and the Presidential Determination, however. Rather, the court adopted the reasoning of the Second Circuit's decision in *Smith v. FRB*, 346 F.3d 264 (2d Cir. 2003). In that case, the Second Circuit held that plaintiffs proceeding under the TRIA to attach seized Iraqi assets in satisfaction of a judgment were precluded from doing so because the President had previously confiscated the blocked assets and vested title in them in the United States Department of the Treasury, thereby rendering those funds insusceptible to execution or attachment. *See id.* at 272 (discussing Exec. Order No. 13,290 of Mar. 20, 2003, 68 Fed. Reg. 14,307 (Mar. 24, 2003)). The Second Circuit and by extension this court - therefore did not reach the issue of whether § 1503 or the Presidential Determination made the TRIA inapplicable to Iraq and expressed no views on the scope or validity of those provisions. *See id.*

In another important development, this court issued its decision in *Cicippio*, 359 U.S. App. D.C. 299, 353 F.3d 1024,

three months before oral argument in this case. That case presented the question whether 28 U.S.C. § 1605(a)(7) or the Flatow Amendment, 28 U.S.C. § 1605 note, created a cause of action against a foreign state. Several decisions in the District Court had held or assumed that these provisions did create a cause of action against foreign states. *See Cicippio*, 353 F.3d at 1032 (citing cases). The court of appeals had not previously affirmed any of these judgments, however, or otherwise squarely confronted the issue. *See Roeder v. Islamic Republic of Iran*, 357 U.S. App. D.C. 107, 333 F.3d 228, 234 n.3 (D.C. Cir. 2003) (noting that it is "far from clear" whether a plaintiff has a cause of action against a foreign state under the FSIA, but resolving the appeal on other grounds); *Bettis v. Islamic Republic of Iran*, 354 U.S. App. D.C. 244, 315 F.3d 325, 333 (D.C. Cir. 2003) (raising but not resolving the question of whether the FSIA creates a cause of action against foreign states); *Price v. Socialist People's Libyan Arab Jamahiriya*, 352 U.S. App. D.C. 284, 294 F.3d 82, 87 (D.C. Cir. 2002) ("There is a question . . . whether the FSIA creates a federal cause of action for torture and hostage taking *against foreign states*.") (emphasis in original).

In *Cicippio*, this court definitively ruled that "neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." 353 F.3d at 1033. We held that § 1605(a)(7) merely waived the immunity of foreign states, without creating a cause of action against them, and that the Flatow Amendment provides a cause of action only against officials, employees, and agents of a foreign state, not against the foreign state itself. *See id.* We further held

that "insofar as the Flatow Amendment creates a private right of action against officials, employees, and agents of foreign states, the cause of action is limited to claims against those officials in their *individual*, as opposed to their official, capacities." *Id.* at 1034. Because of its clear relevance to the instant case, in which the only named defendants are the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein in his official capacity as President of Iraq, we ordered the parties here to consider the implications of our ruling in *Cicippio* for appellees' suit and to be prepared to discuss the issue at oral argument. *See Acree v. Republic of Iraq*, 361 U.S. App. D.C. 410, 370 F.3d 41, 2004 U.S. App. LEXIS 10972, No. 03-5232 (D.C. Cir. Apr. 5, 2004).

II. ANALYSIS

This case requires us to consider whether § 1503 of the EWSAA, as implemented by the May 7 Presidential Determination, makes the terrorism exception to the FSIA inapplicable with respect to Iraq. While it is a close question, we agree with appellees that 28 U.S.C. § 1605(a)(7) is not a provision of law that falls within the scope of § 1503. The District Court therefore properly exercised jurisdiction over appellees' lawsuit under the FSIA. Having reached this conclusion, we need not address the additional issues debated by the parties concerning the retroactive scope and constitutional validity of § 1503 and the Presidential Determination.

Although we find that the District Court had jurisdiction in this matter, the judgment for appellees must nonetheless be vacated. This court's recent decision in *Cicippio* makes it

clear that plaintiffs cannot state a cause of action against a foreign state under § 1605(a)(7) or the Flatow Amendment, the sole bases for appellees' action in this case. Although *Cicippio* was decided after the District Court's judgment in this case, it is nonetheless the controlling precedent to which we must look in determining whether appellees have stated a cause of action. Because appellees' action fails under *Cicippio*, we conclude that the District Court's judgment in favor of appellees must be vacated and their suit dismissed for failure to state a cause of action.

Before reaching any of these merits issues, however, we must consider the propriety of the District Court's order denying the United States' motion to intervene. For, in any appeal, "'the first and fundamental question is that of jurisdiction, first, of [the appellate] court, and then of the court from which the record comes.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998) (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453, 44 L. Ed. 842, 20 S. Ct. 690 (1900)). If the United States were not properly a party to this case, then it would have no right to appeal the District Court's judgment, *see Marino v. Ortiz*, 484 U.S. 301, 304, 98 L. Ed. 2d 629, 108 S. Ct. 586 (1988), and we would be required to dismiss this case without passing upon its merits for lack of a proper appellant.

A. The Motion to Intervene

The District Court's denial of a motion to intervene is an appealable final order. *See Fund for Animals, Inc. v. Norton*, 355 U.S. App. D.C. 268, 322 F.3d 728, 732 (D.C.

Cir. 2003). Our standard of review in such an appeal is mixed. We review pure questions of law *de novo*, findings of fact for clear error, and discretionary issues such as timeliness for abuse of discretion. *See id.* In this case, we find that the District Court abused its discretion in finding the United States' motion to be untimely and erred in denying the motion.

Under Rule 24 of the Federal Rules of Civil Procedure, a prospective intervenor must be permitted to intervene as of right if the applicant claims an interest relating to the subject matter of the case, if the disposition of the case stands to impair that interest, and if the applicant's interest is not adequately represented by the existing parties. *See* FED. R. CIV. P. 24(a). Alternatively, an applicant may be permitted to intervene if his claim shares a question of law or fact in common with the underlying action and if the intervention will not unduly delay or prejudice the rights of the original parties. *See* FED. R. CIV. P. 24(b). Under either test, the prospective intervenor's motion must be "timely." *See* FED. R. CIV. P. 24(a), (b). Evaluation of the timeliness of a motion to intervene lies within the sound discretion of the District Court. *See Fund for Animals*, 322 F.3d at 732 (citing *Mass. Sch. of Law at Andover, Inc. v. United States*, 326 U.S. App. D.C. 175, 118 F.3d 776, 779 (D.C. Cir. 1997) ("*MSL*")).

Courts are generally reluctant to permit intervention after a suit has proceeded to final judgment, particularly where the applicant had the opportunity to intervene prior to judgment. *See Associated Builders & Contractors, Inc. v. Herman*, 334 U.S. App. D.C. 285, 166 F.3d 1248, 1257 (D.C. Cir. 1999); *MSL*, 118 F.3d at 783 n.5; *see also* 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND

PROCEDURE § 1916 (2d ed. 1986) ("WRIGHT & MILLER"). The timeliness of a motion to intervene must be considered in light of all the circumstances of the case, however, *see* WRIGHT & MILLER § 1916, including the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the possibility of prejudice to the existing parties, *see Smoke v. Norton*, 346 U.S. App. D.C. 277, 252 F.3d 468, 471 (D.C. Cir. 2001) (quoting *United States v. AT&T*, 206 U.S. App. D.C. 317, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). Post-judgment intervention is often permitted, therefore, where the prospective intervenor's interest did not arise until the appellate stage or where intervention would not unduly prejudice the existing parties. *See* WRIGHT & MILLER § 1916. In particular, courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court. *See id.*

In *Smoke*, we reversed the District Court's denial of a post-judgment motion to intervene where the existing party indicated it might not bring an appeal. *See* 252 F.3d at 470-71. In doing so, we noted that the would-be intervenor's interests, which had been consonant with those of the existing party, were no longer adequately represented by that party's litigation of the case. *See id.* at 471. In those circumstances, we found the post-judgment motion to intervene for the purpose of prosecuting an appeal to be timely, because "'the potential inadequacy of representation came into existence only at the appellate stage.'" *Id.* (quoting *Dimond v. District of Columbia*, 253 U.S. App. D.C. 111, 792 F.2d 179, 193 (D.C. Cir. 1986)); *see also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395, 53 L. Ed. 2d 423, 97 S. Ct. 2464 (1977)

(holding that the trial court erred in denying as untimely a postjudgment motion to intervene filed promptly after judgment and noting that this holding was "consistent with several decisions of the federal courts permitting post-judgment intervention for the purpose of appeal"); *Dimond*, 792 F.2d at 193-94 (reversing the District Court's denial of post-judgment intervention where the intervenor sought to participate only at the appellate stage).

In this case, the District Court denied the United States' motion to intervene largely because it came after the court had already entered judgment in the case. *See Acree II*, 276 F. Supp. 2d at 98-99. The District Court noted that approximately two months had intervened between the May 7 Presidential Determination and the entry of final judgment for appellees, during which time the United States could have filed its motion. *See id.* However, in reaching this judgment, the District Court failed to consider adequately the unique circumstances of this case.

In particular, the District Court failed to weigh the importance of this case to the United States' foreign policy interests and the purposes for which the Government sought to intervene. This is not a case in which the United States was simply seeking to weigh in on the merits. Rather, the Government's sole purpose in intervening was to raise a highly tenable challenge to the District Court's subject matter jurisdiction in a case with undeniable impact on the Government's conduct of foreign policy and to preserve that issue for appellate review.

In the face of these weighty interests, appellees assert no prejudice arising from the United States' intervention. Nor could they, given the District Court's independent obligation to assure itself of its own jurisdiction. The only result achieved by denial of the motion to intervene in this case is the effective insulation of the District Court's exercise of jurisdiction from all appellate review. In these circumstances, we find that the District Court abused its discretion in denying the United States' motion as untimely. *See United Airlines*, 432 U.S. at 395-96; *Smoke*, 252 F.3d at 470-71. In light of its clear foreign policy interests, the United States was entitled to intervene as of right pursuant to Rule 24. *See Roeder*, 333 F.3d at 233 (permitting the United States to intervene in a case implicating foreign policy concerns). We therefore reverse the decision of the District Court denying the United States' motion to intervene and turn to the merits of the Government's jurisdictional challenge.

B. Subject Matter Jurisdiction Under the FSIA

It is uncontested that at the time appellees commenced their lawsuit in April 2002, the District Court had jurisdiction over the case under § 1605(a)(7), because appellees sought damages for injuries arising from alleged acts of torture that occurred while Iraq was designated as a state sponsor of terrorism. The United States now argues that § 1503 of the EWSAA, as implemented by the May 7 Presidential Determination, made § 1605(a)(7) inapplicable to Iraq and thereby divested the District Court of its jurisdiction in appellees' case. Appellees respond that § 1605(a)(7) is not a provision of law that falls within the scope of § 1503 of the EWSAA. Appellees alternatively contend that § 1503 and

the Presidential Determination cannot be applied against them in this case without resulting in impermissible retroactive effects or violating constitutional principles of separation of powers. We review the District Court's exercise of jurisdiction *de novo. See Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 354 U.S. App. D.C. 257, 315 F.3d 338, 343 (D.C. Cir. 2003).

In our view, while it is an exceedingly close question, the language of § 1503 of the EWSAA does not embrace the terrorism exception to the FSIA. We conclude that § 1503, read in the context of the EWSAA as a whole and its legislative history, is aimed at legal provisions that present obstacles to assistance and funding for the new Iraqi Government and was not intended to alter the jurisdiction of the federal courts under the FSIA.

This issue presents us with a basic question of statutory interpretation. We therefore begin with the language of the EWSAA. *See Holloway v. United States*, 526 U.S. 1, 6, 143 L. Ed. 2d 1, 119 S. Ct. 966 (1999). Section 1503 provides, in its entirety:

> The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: *Provided*, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992, except that such Act shall not apply to humanitarian assistance and supplies: *Provided further, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or*

any other provision of law that applies to countries that have supported terrorism: *Provided further*, That military equipment, as defined by title XVI, section 1608(1)(A) of Public Law 102-484, shall not be exported under the authority of this section: *Provided further*, That section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq: *Provided further*, That provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq: *Provided further*, That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives: *Provided further*, That not more than 60 days after enactment of this Act and every 90 days thereafter the President shall submit a report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration

Appendix A

> Regulations, including identification of end users of such items: *Provided further*, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

EWSAA § 1503, 117 Stat. 559, 579 (citations omitted) (emphasis added). The controversy in this case concerns the second proviso of § 1503, authorizing the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or *any other provision of law that applies to countries that have supported terrorism*." *Id.* (emphasis added). The United States argues that this language embraces the authority to make § 1605(a)(7) inapplicable to Iraq, and that the President carried out that authority in the May 7 Presidential Determination.

The logic of this interpretation is straightforward: Section 1605(a)(7) creates an exception to the sovereign immunity normally enjoyed by foreign states in American courts for suits based on acts of torture or other terrorist acts. This exception applies only if the defendant foreign state was designated as a sponsor of terrorism at the time the acts took place. Section 1605(a)(7) is thus a "provision of law that applies to countries that have supported terrorism." The EWSAA authorizes the President to make such provisions inapplicable to Iraq, which authority the President exercised in the May 7 Determination. Section 1605(a)(7) therefore no longer applies to Iraq and cannot provide a basis for jurisdiction in appellees' case. *Quod erat demonstrandum.*

The difficulty with this view is that it focuses exclusively on the meaning of one clause of § 1503, divorced from all that surrounds it. This approach violates "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 116 L. Ed. 2d 578, 112 S. Ct. 570 (1991) (citations omitted). In interpreting any statute, we must "'consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'" *Holloway*, 526 U.S. at 6 (quoting *Bailey v. United States*, 516 U.S. 137, 145, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995)).

Traditional interpretive canons likewise counsel against a reading of the second proviso of § 1503 that ignores the context of § 1503 and the EWSAA as a whole. In particular, the canons of *noscitur a sociis* and *ejusdem generis* remind us that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 154 L. Ed. 2d 972, 123 S. Ct. 1017 (2003) (internal quotation marks and cita- tions omitted). In addition, where statutory language is phrased as a proviso, the presumption is that its scope is confined to that of the principal clause to which it is attached. *See United States v. Morrow*, 266 U.S. 531, 534-35, 69 L. Ed. 425, 45 S. Ct. 173, 60 Ct. Cl. 1023 (1925).

Applying the foregoing principles, we conclude that the scope of § 1503 is narrower than the Government suggests.

Appendix A

The primary function of the EWSAA was to provide emergency appropriations in support of the United States' military operations in Iraq. The Act also provided additional funding for homeland security activities in the United States. Chapter 5 of the Act, entitled "Bilateral Economic Assistance," appropriated funds for a variety of assistance programs to Iraq and other American allies. *See* EWSAA, ch. 5, 117 Stat. 559, 572-81. In addition to the Iraq Relief and Reconstruction Fund, these programs included the Child Survival and Health Programs Fund, International Disaster Assistance, the Economic Support Fund (providing assistance to the governments of Jordan, Egypt, Turkey, the Philippines, and Afghanistan), Loan Guarantees to Israel, the Emergency Refugee and Migration Assistance Fund, peacekeeping operations, and similar activities. Thus, each program funded in Chapter 5 of the EWSAA addresses matters of bilateral economic assistance to Iraq and other countries. The United States points to nothing in this portion of the Act - or elsewhere in the EWSAA, for that matter - that addresses the jurisdiction of the federal courts.

Section 1503 is one of several "general provisions" within Chapter 5 of the EWSAA. *See* EWSAA § § 1501-1506, 117 Stat. 559, 578-81. These "general provisions" all supply specific instructions or impose conditions upon the outlays of money appropriated throughout the Chapter. For example, § 1501 provides that the President has authority to transfer money between the several programs funded in the Chapter, upon proper notification to Congress. Section 1502 provides that "assistance or other financing under this chapter may be provided for Iraq notwithstanding any other provision of law," subject to certain provisos. Section 1504 authorizes

the President to export certain nonlethal military equipment to Iraq, notwithstanding any other provision of law, subject to certain conditions and reporting requirements. Section 1503 thus finds itself situated among several other provisions that govern the distribution of assistance to Iraq within the context of ongoing military operations and against a backdrop of legal obstacles that would otherwise prohibit such assistance.

Section 1503 itself authorizes the President to suspend the application of any provision of the Iraq Sanctions Act of 1990, subject to eight provisos. *See* EWSAA § 1503, 117 Stat. 559, 579. Three of the provisos impose notification or reporting requirements and provide for expiration of the suspension authority granted in § 1503. The remaining provisos are each responsive to a specific aspect of the ISA or other statutes that are implicated by the suspension authority granted in § 1503, thereby resolving potential ambiguities that may arise in the statutory landscape as a result of the suspension of the ISA. Thus, the first proviso, stating that nothing in § 1503 shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992, reflects the fact that portions of the Non-Proliferation Act incorporate the ISA by reference and are to remain in effect despite suspension of the ISA. *See* Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, § § 1601-08, 106 Stat. 2315, 2571-75 (codified at 50 U.S.C. § 1701 note (2000)). Similarly, the fifth proviso states that "provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq." This language

responds in part to § 586G(a)(5) of the ISA, which requires the United States to oppose any loan or financial or technical assistance to Iraq by international financial institutions, pursuant to other provisions of law incorporated into the ISA. *See* ISA § 586G(a)(5), 104 Stat. 1979, 2052. This fifth proviso thus makes clear that the President may suspend not only the ISA, but also those provisions of law that are incorporated by reference into the ISA's prohibition on American support for assistance to Iraq from international financial institutions. The remaining provisos are similarly tied to specific features of the ISA and the other statutes with which the ISA interacts.

The second proviso of § 1503 - which lies at the heart of the controversy in the instant case - provides that "the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism." Just like the other provisos in § 1503, this language is responsive to a particular section of the ISA. As we have seen, the ISA required that certain enumerated provisions of law, including § 620A of the Foreign Assistance Act of 1961, and "all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism" be fully enforced against Iraq. *See* ISA § 586F(c), 104 Stat. 1979, 2051. The second proviso in § 1503 thus makes clear that the authority in § 1503 to suspend the ISA includes the authority to make inapplicable to Iraq § 620A of the FAA and those additional provisions of law incorporated into § 586F(c) of the ISA.

As previously noted, § 620A of the FAA prohibits the grant of assistance to any country determined by the Secretary

of State to have "repeatedly provided support for acts of international terrorism." 22 U.S.C. § 2371(a). A survey of the other provisions enumerated in § 586F(c) of the ISA indicates that all of those provisions deal with restrictions on assistance to state sponsors of terrorism. These provisions include § 40 of the Arms Export Control Act, 22 U.S.C. § 2780 (2000); § § 555 and 556 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1991, Pub. L. No. 101-513, § § 555-556, 104 Stat. 1979, 2021-22 (1990); and § 555 of the International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 555, 99 Stat. 190, 227. Each of these provisions calls for the imposition of economic sanctions on countries that are determined to have supported international terrorism, including restrictions on exports, aviation boycotts, and prohibitions on loans, credits, or other financial assistance. Read within this context, the reference in the ISA to "all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism" is best read to denote provisions of law that call for economic sanctions and prohibit grants of assistance to state sponsors of terrorism.

To recapitulate, the meaning of the disputed language in § 1503, like each of the other substantive provisos in that section, is thus illuminated by consideration of the corresponding provisions of the ISA. *See Morrow*, 266 U.S. at 534-35 ("The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation. Its grammatical and logical scope is confined to the subject-matter of the principal clause.") (citations omitted). The reference in

§ 586F(c) of the ISA to § 620A of the FAA and "all other provisions of law" that impose sanctions on state sponsors of terrorism appears clearly to encompass laws which, like the FAA and the other enumerated provisions, impose obstacles to assistance to designated countries. None of these provisions remotely suggests any relation to the jurisdiction of the federal courts. Thus, when read in juxtaposition with this portion of the ISA, the second proviso of § 1503 is more persuasively interpreted as sharing a similar scope. That is, it authorizes the President to make inapplicable with respect to Iraq those provisions of law that impose economic sanctions on Iraq or that present legal obstacles to the provision of assistance to the Iraqi Government. This interpretation reflects a central function of Chapter 5 of the EWSAA, which is to provide for relief and reconstruction in post-war Iraq.

Although sparse, the legislative history of § 1503 of the EWSAA likewise supports our interpretation of the disputed language in § 1503. The EWSAA began as a request from the President to Congress for emergency supplemental appropriations to support Department of Defense operations in Iraq and for other purposes. *See* Letter from President George W. Bush to Rep. Dennis Hastert, Speaker of the House of Representatives (Mar. 25, 2003), *reprinted in* H.R. DOC. No. 108-55, at 1 (2003). The portion of the President's request dealing with bilateral economic assistance included language repealing the Iraq Sanctions Act of 1990, subject to the proviso "that the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, as amended, or other provision of law that applies to countries that have supported terrorism." H.R. DOC. No.

108-55, at 24. The request explained that this language would "authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act." *Id.*

One week after the President issued this request for supplemental appropriations, the Committees on Appropriations of the Senate and House reported bills that each contained language similar to that proposed by the President. The Senate version, reported on April 1, 2003, repeated exactly the language of the President's request, repealing the ISA and authorizing the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, as amended, or other provision of law that applies to countries that have supported terrorism." S. 762, 108th Cong. § 503 (2003). The accompanying committee report explained that this section of the Senate bill "provided the request for the repeal of the Iraqi Sanctions Act of 1990 [sic], and *other limitations on assistance for Iraq*." S. REP. No. 108-33, at 21 (2003) (emphasis added). The House version, reported on April 2, 2003, included the same language that became § 1503 of the EWSAA. *See* H.R. 1559, 108th Cong. § 1402 (2003). The committee report accompanying the House bill explained that this language was "similar to the authority requested by the President that would repeal the Iraq Sanctions Act of 1990 and authorize the President to make inapplicable with respect to Iraq section 620A and section 307 of the Foreign Assistance Act." H.R. REP. No. 108-55, at 30 (2003).

The Conference Committee agreed to the language proposed in the House version of the supplemental

appropriation. *See* H.R. CONF. REP. No. 108-76, at 21 (2003). The conferees reported that § 1503 of the conference agreement "would make inapplicable the Iraq Sanctions Act of 1990 and authorize the President to make inapplicable with respect to Iraq section 620A and section 307 of the Foreign Assistance Act." *Id.* at 76. The language of the conference agreement was passed by both houses on April 12, 2003, without further amendment to § 1503, and signed by the President on April 16, 2003.

While not conclusive, this legislative history bolsters our conclusion as to the scope of § 1503. There is no reference in the legislative history to the FSIA in particular or to federal court jurisdiction in general. Rather, the legislative history of the EWSAA reflects an underlying legislative concern with eliminating statutory restrictions on aid and exports needed for the reconstruction of Iraq. This concern is easily understood. Any effort by the United States Government or private businesses in the United States to provide assistance or conduct business with the new Iraqi regime, in the absence of § 1503, would be barred by numerous provisions of law until such time as the President and the Secretary of State could make the necessary certifications to Congress to remove Iraq's designation as a state sponsor of terrorism. *See, e.g.*, 22 U.S.C. § 2371(c) (rescission provisions of the Foreign Assistance Act of 1961); 50 U.S.C. App. § 2405(j)(4) (rescission provisions of the Export Administration Act). Section 1503 permits assistance and reconstruction efforts to proceed without waiting for this lengthy and complex certification process to run its course by setting aside the ISA and "other limitations on assistance for Iraq," S. REP. No. 108-33, at 21 (2003). This legislative history, along with

the other provisions in § 1503, the EWSAA as a whole, and the complex web of economic sanctions and prohibitions on assistance that previously applied to Iraq thus supports our interpretation that the general reference in § 1503 to "other provisions of law that apply to countries that have supported terrorism" embraces only those provisions of law that constitute legal restrictions on assistance to and trade with Iraq.

Because we find, as a matter of statutory interpretation, that § 1503 does not make the terrorism exception to the FSIA inapplicable to Iraq, we need not consider whether § 1503 operates retroactively to appellees' pending lawsuit. Nevertheless, comparison of the temporal scope of 28 U.S.C. § 1605(a)(7) with that of § 1503 lends further support to our resolution of the statutory interpretation issue. The language of § 1503 is broad, general, and unclear. Yet, the United States seeks to employ it to supersede the much more precise language of § 1605(a)(7), which already provides in quite specific terms for the prospective restoration of sovereign immunity once a country is decertified as a sponsor of terrorism. Specifically, § 1605(a)(7) provides that the terrorism exception to foreign sovereign immunity arises only when a defendant country is designated as a sponsor of terrorism "at the time the act occurred, unless later so designated as a result of such act." 28 U.S.C. § 1605(a)(7)(A). Thus, the FSIA specifically provides that when a country, once designated as a state sponsor of terrorism, is subsequently restored to good standing, that country is still amenable to suit for acts that took place prior to the restoration of its sovereign immunity. As the United States would have it, however, waiver of § 1605(a)(7) in the case

of Iraq pursuant to § 1503 would restore Iraq's immunity even for acts that occurred while Iraq was still considered a sponsor of terrorism.

This perplexing result appears even more bizarre when the sunset provisions of § 1503 are taken into account. The final proviso in § 1503 states that "the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first." EWSAA § 1503, 117 Stat. 559, 579. If the United States were correct in its interpretation of § 1503, then this sunset provision would mean that, absent intervening events, § 1605(a)(7) would once again be available as a basis of jurisdiction after September 30, 2004. At such time, the District Court would properly have jurisdiction over a suit against Iraq based on events that occurred while Iraq was designated as a state sponsor of terrorism. It makes little sense to say that between the date of the May 7 Presidential Determination and the date of expiration of the authorities conferred in § 1503, there is no federal court jurisdiction for suits against Iraq, but that after that period elapses, such suits will again be available. Yet, this is precisely the result that follows if one imposes the unwieldy language of § 1503 upon the otherwise careful and precise scheme established under the FSIA. Thus, considerations of temporal scope weigh in favor of an interpretation of § 1503 that avoids this conflict.

The United States contends that, even if the disputed clause in § 1503 must be construed to reach only those

provisions of law that are similar in nature to the legal restrictions on assistance to Iraq that are enumerated elsewhere in § 1503, the terrorism exception to the FSIA still falls within the scope of provisions the President is authorized to make inapplicable to Iraq. Specifically, the United States points out that § 1605(a)(7) shares a "criterion of similarity" with the other provisions mentioned in § 1503, Reply Br. at 17, namely, that it is a provision of law that imposes penalties on foreign nations as a result of their designation as sponsors of terrorism. This contention has some attraction, because § 1605(a)(7) arguably poses a threat of a sort to American reconstruction efforts in Iraq by providing jurisdiction in American courts for cases seeking huge liability judgments against the Iraqi Government. Under this view, it is plausible to suggest that § 1503 encompasses the terrorism exception to the FSIA.

It is true that section 1605(a)(7) is not totally dissimilar to laws imposing economic sanctions or prohibitions on assistance and trade, in that it penalizes countries designated as supporters of terrorism. However, even if the FAA and the other economic penalties discussed above could be said to share this single common attribute with § 1605(a)(7), the FSIA's rules of federal court jurisdiction would still be several steps removed from those other provisions, which are all much more closely analogous to one another. Because § 1503, the EWSAA as a whole, and the relevant legislative history all reflect an overriding concern for economic assistance, trade, and reconstruction in Iraq, we find that this context counsels against a reading of § 1503 that stretches so far as to reach a law, like the FSIA, that is largely dissimilar to all of the "look-alike" provisions affected by § 1503.

We conclude that when § 1503 is read in the context of the other provisions of the EWSAA and its legislative history, as it must be, that provision is best understood as applying only to legal restrictions on assistance and funding for the new Iraqi Government. There is nothing in the language of § 1503, the EWSAA as a whole, or its legislative history to suggest that Congress intended by this statute to alter the jurisdiction of the federal courts under the FSIA. We acknowledge that this is a close question. We nevertheless conclude that § 1503 was not intended to apply to § 1605(a)(7). The scope of the May 7 Presidential Determination is immaterial, because it cannot exceed the authority granted in § 1503. We therefore affirm the District Court's exercise of jurisdiction over appellees' claims under 28 U.S.C. § 1605(a)(7).

C. Cause of Action

Having concluded that jurisdiction in this case properly lies in the District Court, we arrive at the clear conflict between the District Court's judgment in favor of appellees and this court's recent holding in *Cicippio-Puleo v. Islamic Republic of Iran*, 359 U.S. App. D.C. 299, 353 F.3d 1024. In *Cicippio*, we held that neither § 1605(a)(7) nor the Flatow Amendment, nor the two considered together, supplies a cause of action against foreign states. *See* 353 F.3d at 1033. In the instant case, the District Court predicated its finding of liability on precisely those provisions, and appellees point to no alternative cause of action. We therefore conclude that appellees have failed to state a cause of action.

Appendix A

Because of the default of the Iraqi defendants, no party questioned the existence of appellees' cause of action during the proceedings in the District Court. Nor did the United States raise this issue in its motion to intervene. Nevertheless, no party contests this court's discretion to reach this issue on our own motion in light of the intervening change in law.

Appellees rightly contend that non-jurisdictional defenses such as the failure to state a cause of action are waivable and that courts generally do not permit parties to raise such issues for the first time on appeal. The right of a party to *advance* this objection is not coextensive with the discretion of the court to *consider* the issue, however. As we have held, "courts of appeals are not rigidly limited to issues raised in the tribunal of first instance; they have a fair measure of discretion to determine what questions to consider and resolve for the first time on appeal." *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 294 U.S. App. D.C. 198, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992) (addressing the existence of a cause of action for the first time on appeal in light of a relevant intervening Supreme Court decision). Thus, while we will ordinarily refrain from reaching non-jurisdictional questions that have not been raised by the parties or passed on by the District Court, we may do so on our own motion in "exceptional circumstances." *Id.* ("Qualifying circumstances include ... an intervening change in the law. . . .").

Our intervening decision in *Cicippio*, which definitively resolved a previously open question of law that we find to be dispositive in appellees' case, surely qualifies as the type of exceptional circumstance that justifies our exercise of discretion. *See id.* at 419. The issue before us is "purely one

of law important in the administration of federal justice, and resolution of the issue does not depend on any additional facts not considered by the district court." *Id.* at 419 n.5. The circumstances of this case are even more extraordinary when one considers the stakes: Appellees have obtained a nearly-billion dollar default judgment against a foreign government whose present and future stability has become a central preoccupation of the United States' foreign policy. In these circumstances, it would be utterly unseemly for this court to ignore the clear implications of our holding in *Cicippio*. We therefore find it appropriate to exercise our discretion to determine whether appellees' case must be dismissed for failure to state a cause of action.

In their complaint, appellees premised their claim of liability on § 1605(a)(7), as amended, asserting that this provision "creates a federal cause of action for torture . . . of American nationals, or for the benefit of American national claimants, when such acts are committed by a foreign state designated as a state sponsor of terrorism." Compl. P 596, J.A. 143. The complaint pointed to several decisions of the District Court that proceeded on the assumption that § 1605(a)(7), as amended by the Flatow Amendment, "not only waives sovereign immunity and provides jurisdiction but also creates a cause of action within its scope of applicability." *Id.* While appellees also alluded to the "traditional torts of assault, battery and intentional infliction of emotional distress" in their generic form, Compl. P 597, J.A. 143, they did not point to any other specific source in state, federal, or foreign law for their cause of action.

The District Court similarly relied on § 1605(a)(7) and the Flatow Amendment, finding that those provisions "create[] a federal cause of action against officials, employees and agents of a foreign state, as well as the state and its agencies and instrumentalities themselves." *Acree I*, 271 F. Supp. 2d at 215. In company with appellees, the District Court reasoned that "suits brought under § 1605(a)(7) may be based on conventional common law torts such as assault, battery, and intentional infliction of emotional distress," *id.*, and found that the facts appellees alleged satisfied the elements of several such torts, *see id.* at 215-17. The District Court cited no alternative cause of action.

In *Cicippio*, we held that neither § 1605(a)(7) nor the Flatow Amendment, nor the two together, creates a cause of action against foreign states themselves. *See Cicippio*, 353 F.3d at 1033. This holding applies also to suits against "agencies or instrumentalities" of a foreign state, which are included in the FSIA's definition of "foreign state," *see* 28 U.S.C. § 1603(a), (b); *see also Roeder*, 333 F.3d at 234 (explaining that an official state entity whose core functions are governmental is treated as the foreign state itself for purposes of the FSIA); Compl. P 3, J.A. 33 (stating that the Iraqi Intelligence Service is an agency or instrumentality of Iraq and therefore also a "foreign state" within the meaning of the FSIA). *Cicippio* also made clear that any suit against an official of a foreign state must be a suit in that official's *personal* capacity. *See* 353 F.3d at 1034; *cf.* Compl. PP 2-3, J.A. 31-33 (naming as a defendant Saddam Hussein "in his official capacity as President of the Republic of Iraq."). The causes of action advanced by appellees before the District Court therefore do not suffice to state claims for which relief may be granted.

In response to our order to consider this issue in preparation for oral argument, appellees did not advance any alternative causes of action. At oral argument, counsel for appellees gestured again toward generic common law torts, *see* Oral Argument Tr. at 23-29, but generic common law cannot be the *source* of a federal cause of action. The shared common law of the states may afford useful guidance as to the rules of decision in a FSIA case where a cause of action arises from some specific and concrete source of law. *See Bettis*, 315 F.3d at 333 (assuming, *arguendo*, that plaintiffs stated a cause of action under the Flatow Amendment and then turning to generic common law to flesh out the controlling substantive law). But there is no support for the proposition that generic common law itself may furnish the cause of action. Rather, as in any case, a plaintiff proceeding under the FSIA must identify a particular cause of action arising out of a specific source of law. Appellees failed to do so in this case.

Here, appellees pointed to no source of liability other than § 1605(a)(7) and the Flatow Amendment. When pressed repeatedly at oral argument, appellees offered no coherent alternative. We therefore find no cause to remand this case to the District Court in order to allow appellees to amend their complaint to state a cause of action under some other source of law. *See Cicippio*, 353 F.3d at 1036. In *Cicippio*, we permitted such a remand because the state of the law at the time of that appeal "may have . . . misled" the plaintiffs in that case into assuming that the Flatow Amendment afforded a cause of action against the foreign state defendant. *See id.* In addition, we noted that *amici* in that case had advanced the possibility that an alternative source of law

might supply a viable cause of action. *See id.* In this case, by contrast, our decision in *Cicippio* and our order to the parties prior to oral argument put appellees on notice of this issue. Despite this notice, appellees offered no alternative cause of action when asked to do so at oral argument. Accordingly, appellees' suit must be dismissed for failure to state a cause of action.

III. CONCLUSION

We are mindful of the gravity of appellees' allegations in this case. That appellees endured this suffering while acting in service to their country is all the more sobering. Nevertheless, we cannot ignore the magnitude of their default judgment or its impact on the United States' conduct of foreign policy where the law is indisputably clear that appellees were not legally entitled to this judgment. We reverse the order of the District Court denying the United States' motion to intervene, *Acree II*, 276 F. Supp. 2d. 95. We vacate the District Court's judgment for appellees, *Acree I*, 271 F. Supp. 2d 179, and dismiss appellees' suit against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein in his official capacity as President of Iraq on the grounds that appellees have failed to state a cause of action.

So ordered.

Appendix A

CONCURBY: ROBERTS,

CONCUR:

ROBERTS, *Circuit Judge*, concurring in part and concurring in the judgment: I agree with the majority that the district court erred in denying the United States' motion to intervene. I also concur in the court's judgment of dismissal, but I reach that result by a different path than the majority has taken. In my view, Section 1503 of the EWSAA includes the authority to make Section 1605(a)(7) of the FSIA—on its face a "provision of law that applies to countries that have supported terrorism"—inapplicable to Iraq, and the Presidential Determination of May 7, 2003 therefore ousted the federal courts of jurisdiction in cases that relied on that exception to Iraq's sovereign immunity. I also conclude that this ouster of jurisdiction is properly applied to pending cases, and that the district court's judgment should thus be vacated and the case dismissed for want of jurisdiction.

A. The Scope of Section 1503 of the EWSAA

1. The pertinent language of Section 1503 is straightforward, authorizing the President to make inapplicable to Iraq Section 620A of the Foreign Assistance Act of 1961 and "*any* other provision of law that applies to countries that have supported terrorism" (emphasis added). As this court recently observed, "the Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application." *Consumer Elecs. Ass'n v. FCC*, 358 U.S. App. D.C. 180, 347 F.3d 291, 298 (D.C. Cir. 2003). "Any other

provision" should be read to mean "any other provision," not, as the majority would have it, "provisions that present obstacles to assistance and funding for the new Iraqi Government." 358 U.S. App. D.C. 180, 347 F.3d 291, Slip op. at 16.

This is particularly true given that Congress knows how to use more limited language along the lines of the majority's construction when it wants to. Congress did just that in another appropriations statute enacted just two months prior to the EWSAA. In that statute, Congress declared that certain restrictions on funding to foreign countries should not be construed to restrict assistance to nongovernmental organizations in those countries, but provided that this easing of restrictions would not apply "with respect to section 620A of the Foreign Assistance Act of 1961 or any *comparable* provision of law *prohibiting assistance* to countries that support international terrorism." Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. E, § 537(c)(1), 117 Stat. 11, 196 (Feb. 20, 2003) (emphases added). The EWSAA, of course, refers to the very same section of the Foreign Assistance Act but includes substantially broader language in its subsequent catchall phrase. This use of different language in two statutes so analogous in their form and content, enacted so close in time, suggests that the statutes differ in their meaning, and that the facially broader language was in fact intended to have the broader scope.

2. The majority notes that Section 1605(a)(7) of the FSIA already "specifically provides that when a country, once designated as a state sponsor of terrorism, is subsequently restored to good standing, that country is still amenable to suit for acts that took place prior to the restoration of its sovereign

immunity." 358 U.S. App. D.C. 180, 347 F.3d 291, Slip op. at 25. The majority then concludes that the general power conferred by Section 1503 of the EWSAA should not be read to authorize the President to restrike this previously-fixed balance between the interests of a newly non-terrorist state and those of victims of terrorism.

I respectfully disagree. The majority's reading simply assumes that the balance Congress struck in 1996 was left untouched by the EWSAA. In 2003, however, Congress *for the first time* confronted the prospect that a friendly successor government would, in its infancy, be vulnerable under Section 1605(a)(7) to crushing liability for the actions of its renounced predecessor. *See* U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 1999, at 2 (April 2000) (noting that the list of state sponsors of terrorism had been unchanged since 1993); U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2001, at 63 (May 2002) (listing the same states). Certainly there is no evidence indicating that, when it enacted Section 1605(a)(7), Congress contemplated that a successor government's cessation of support for terrorism would come about under circumstances like those in Iraq. Given the broad language of the EWSAA and the circumstances surrounding its enactment, it is entirely possible—and surely not "perplexing," 358 U.S. App. D.C. 180, 347 F.3d 291, slip op. at 25—that Congress in 2003 made an *ad hoc* decision to strike a different balance in favor of the new government of Iraq. The whole point of Section 1503 was to change existing rules to respond to new realities; it is not a compelling argument against a construction of the section to object that it would do just that.

3. The majority further finds that construing the EWSAA to authorize an ouster of jurisdiction over Iraq in Section 1605(a)(7) cases would be "bizarre" in light of the sunset provisions of Section 1503. 358 U.S. App. D.C. 180, 347 F.3d 291, Slip op. at 25. "Absent intervening events," the majority states, "[Section] 1605(a)(7) would once again be available as a basis of jurisdiction after September 30, 2004." *Id.* Given the range of possibilities contained in the majority's careful caveat, the prediction itself is overwrought. As one member of Congress has explained, in relation to a different statute, "sunsetting laws does not mean repealing them. Laws would only expire if Congress failed to meet its responsibility to reexamine and renew these statutes within a specified period of time." S. REP. NO. 104-85, at 64 (1995) (statement of Sen. Grams).

One need look no further than the title of the EWSAA to discern its emergency nature; a sunset provision in such a statute is intended to buy time for fuller consideration of the issues, rather than to establish an immutable date for the statute's presumed extinction. And it hardly needs saying that the sunset provision in Section 1503 applies not only to the proviso at issue in this case, but to all of that section. If the majority's prediction of abject congressional lassitude is accurate, the Iraq Sanctions Act of 1990 will itself return to full strength on September 30, 2004. Nothing in the ISA requires that Iraq be included on the State Department's list of state sponsors of terrorism, so even an orderly de-listing of Iraq by the executive branch under the procedures of 22 U.S.C. § 2371(c) would not alter the ISA's restrictions on assistance. In short, the occurrence of "intervening events" is far more likely than their absence.

4. I agree with the majority that this question of statutory interpretation is close, and I do not suggest that the EWSAA is entirely unambiguous. But the plaintiffs err in their assumption that the government must somehow prove that Congress intended the statute's broad terms to be construed broadly. *See* Appellees' Br. at 25 ("There is no indication that the proviso [in Section 1503] was intended to be a broad tool of foreign policy involving a retroactive restoration of sovereign immunity"); *cf.* 358 U.S. App. D.C. 180, 347 F.3d 291, slip op. at 24 ("There is no reference in the legislative history [of Section 1503] to the FSIA in particular or to federal court jurisdiction in general."). The burden is precisely the opposite: the party seeking to narrow the application of the statute must demonstrate that Congress intended something less than what the law on its face says. *See, e.g., Harrison v. PPG Industries*, 446 U.S. 578, 589, 64 L. Ed. 2d 525, 100 S. Ct. 1889 (1980) ("The phrase, 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says"). And as this court has stated, "the plainer the language, the more convincing contrary legislative history must be." *Cole v. Harris*, 187 U.S. App. D.C. 156, 571 F.2d 590, 597 (D.C. Cir. 1977) (internal quotation marks and citation omitted).

Harrison in fact resembles this case in significant respects: the Court was interpreting an amendment to the Clean Air Act that provided for review, in the appropriate federal court of appeals, of "locally and regionally applicable actions" taken by the Environmental Protection Agency "under specifically enumerated provisions of the Act, and of '*any other final action* of the [EPA under the Act] . . . which is locally or regionally applicable.' " 446 U.S. at 579 (quoting

42 U.S.C. § 7607(b)(1) (1976 & Supp. II)) (emphasis and ellipsis in original). The respondents, citing the *ejusdem generis* canon of interpretation (the corollary *noscitur a sociis* was not then in vogue), urged the court to construe the phrase "any other final action" to mean only final actions similar to those specifically identified in the statute. *Id.* at 587. The Court refused, noting that the *ejusdem generis* canon should be applied only when the meaning of the text is uncertain and finding "no uncertainty in the meaning of the phrase, 'any other final agency action.'" *Id.* at 588.

Significantly, the Court also rejected the respondents' argument—based on the "scant" legislative history of the amendment—that it was "unlikely . . . that Congress would have expanded so radically the jurisdiction of the courts of appeals, and divested the district courts of jurisdiction, without some consideration and discussion of the matter." *Id.* at 591, 592. "In ascertaining the meaning of a statute," the Court stated, "a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Id.* at 592. The Court concluded that the statutory language meant "exactly what it said, namely, *any other* final action." *Id.* at 589 (emphasis in original).

More recently, the Court unanimously rejected the suggestion that certain broad terms of the Federal Power Act (FPA) should be construed narrowly in light of Congress's focused intent to overrule one of the Court's prior cases: "Even if [the prior case] catalyzed the enactment of the FPA, [it] does not define the outer limits of the statute's coverage." *New York v. FERC*, 535 U.S. 1, 21, 152 L. Ed. 2d 47, 122 S. Ct. 1012 (2002). In my view, *Harrison* and *New York*

illustrate the appropriate approach to a broadly worded statute such as Section 1503 of the EWSAA. The absence of any reference to the FSIA in the legislative history does not compel the conclusion that Section 1503 does not reach it, and the fact that Congress may have been focused primarily on removing barriers to the flow of aid to Iraq does not mean that the statute refers exclusively to such barriers. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689, 149 L. Ed. 2d 904, 121 S. Ct. 1879 (2001) ("the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (quoting *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212, 141 L. Ed. 2d 215, 118 S. Ct. 1952 (1998)).[1] Because the legislative history contains no "convincing" indication, *Cole*, 571 F.2d at 597, that Congress did *not* intend to include Section 1605(a)(7) of the FSIA among the "any other" provisions that the President could render inapplicable to Iraq, I conclude that the President was authorized to—and did, with the Presidential Determination—oust the federal courts of jurisdiction over Iraq in Section 1605(a)(7) cases.

5. I do not mean to suggest that the contrast between the language of the Consolidated Appropriations Resolution and that of the EWSAA is conclusive proof of Congress's intent-but then neither is the majority's invocation of the preexisting balance struck in Section 1605(a)(7). I appreciate that my view of Congress's purpose in restriking that balance is necessarily speculative--but then so is the majority's more

1. Application of the *ejusdem generis* canon seems particularly inappropriate in this case because the statute provides only one point of reference (Section 620A of the Foreign Assistance Act) from which to extrapolate.

limited view of Congress's purpose to reach only aid statutes. The majority can cite *United States v. Morrow*, 266 U.S. 531, 69 L. Ed. 425, 45 S. Ct. 173, 60 Ct. Cl. 1023 (1925), for a presumption that supports its construction of the pertinent proviso, *see* 266 U.S. 531, 69 L. Ed. 425, 45 S. Ct. 173, slip op. at 19, 22—but I can respond with a case of similar vintage for the opposite proposition that "a frequent use of the proviso in Federal legislation [is] to introduce . . . new matter extending rather than limiting or explaining that which has gone before." *Interstate Commerce Comm'n v. Baird*, 194 U.S. 25, 37, 48 L. Ed. 860, 24 S. Ct. 563 (1904). And both I and the majority (and everyone else, for that matter) are on tenuous ground when it comes to predicting whether Congress will act prior to the sunset date in Section 1503.[2]

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2. There is of course an established framework that governs judicial review of statutory interpretations by agencies in the executive branch. *See Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). In such circumstances, we defer to any reasonable construction adopted by the entity Congress has entrusted with administering the statute. *Id.* at 843-45. There is no doubt that the President's interpretation of Section 1503 to cover Section 1605(a)(7) is at least a reasonable one. The applicability of *Chevron* to presidential interpretations is apparently unsettled, *see Chamber of Commerce of the United States v. Reich*, 316 U.S. App. D.C. 61, 74 F.3d 1322, 1325 (D.C. Cir. 1996); Note, *Extending* Chevron *Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President*, 86 CORNELL L. REV. 411 (2001), but it is interesting to note that this would be an easy case had the EWSAA provided that, say, the Secretary of State may exercise the authority conferred under Section 1503. It is puzzling why the case should be so much harder when the authority is given to the Secretary's boss.

In such circumstances I prefer to rest on the firmer foundation of the statutory language itself. Give me English words over Latin maxims. The words here—"any other provision of law that applies to countries that have supported terrorism"—are, even if not entirely unambiguous, plain enough to impose a heavy burden on those who would rely on canons, or structure, or assumed purposes to conclude the words do not reach a law that applies, by its terms, to a foreign state "designated as a state sponsor of terrorism." 28 U.S.C. § 1605(a)(7)(A). The majority ably marshals the arguments on the other side, but at the end of the day I find greater solace in the words themselves. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992) ("canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").[3]

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3. The plaintiffs argue that the grant of such authority to the President is unconstitutional in light of *Clinton v. New York*, 524 U.S. 417, 141 L. Ed. 2d 393, 118 S. Ct. 2091 (1998), because such a grant would empower the President "to change the text of § 1605(a)(7) so that Iraq's immunity no longer turns on its status at the time the act occurred" or to "repeal[] § 1605(a)(7) solely as it relates to Iraq." Appellees' Br. at 50. The actions authorized by the EWSAA are a far cry from the line-item veto at issue in *Clinton*, and are instead akin to the waivers that the President is routinely empowered to make in other areas, particularly in the realm of foreign affairs. *See, e.g.*, 22 U.S.C. § 7207(a)(3) (authorizing the President to waive a statutory prohibition on assistance to certain countries if he determines that a waiver is in the national security interest).

B. Application to Pending Cases

The plaintiffs argue that even if Section 1503 is properly read to include an ouster of jurisdiction under the FSIA, applying the statute to pending cases such as this one would be impermissibly retroactive under *Landgraf v. USI Film Products*, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). This court reviewed the applicability of the *Landgraf* framework to jurisdictional statutes in *LaFontant v. INS*, 328 U.S. App. D.C. 359, 135 F.3d 158 (D.C. Cir. 1998), and concluded that the pertinent question—assuming Congress had not explicitly addressed retroactivity—was whether the statute spoke to the power of the court or instead to the substantive rights of the parties. Retroactive application is permissible in the former case, but not the latter. *Id.* at 163.

We recently held that Section 1605(a)(7) of the FSIA is solely a jurisdictional provision that creates no cause of action and does not affect the substantive law determining the liability of a foreign state. *Cicippio-Puleo v. Islamic Republic of Iran*, 359 U.S. App. D.C. 299, 353 F.3d 1024, 1033-34 (D.C. Cir. 2004). Rendering Section 1605(a)(7) inapplicable, therefore, can only affect the power of the court and not the substantive rights of the parties. Application of the EWSAA to Section 1605(a)(7) is accordingly not impermissibly retroactive with respect to pending cases.

Moreover, the concern animating the Supreme Court's retroactivity jurisprudence is that "settled expectations should not be lightly disrupted." *Landgraf*, 511 U.S. at 265 (footnote omitted). At the time of the primary conduct at issue here, the jurisdictional grant of Section 1605(a)(7) did not even

exist. We now know that the cause of action plaintiffs invoke did not exist then or now. *Cicippio*, 353 F.3d at 1033-34; *see* 358 U.S. App. D.C. 299, 353 F.3d 1024, slip op. at 27-31. Any claim plaintiffs could have brought was in any event always subject to compromise or abrogation by the Executive. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374, 2386-87, 156 L. Ed. 2d 376 (2003); *Dames & Moore v. Regan*, 453 U.S. 654, 686, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981). Under these circumstances, there is no impediment to application of the normal rule that provisions addressing the power of a court be given retroactive effect.

* * *

For the foregoing reasons, I would hold that Section 1503 of the EWSAA and the Presidential Determination deprived the courts of jurisdiction over suits against Iraq under Section 1605(a)(7), and that the new jurisdictional rule applies to pending cases, including this one. I therefore agree that the judgment of the district court should be vacated and the case dismissed.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DENYING INTERVENTION DECIDED AUGUST 6, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 02-0632 (RWR)

CLIFFORD ACREE, COLONEL, et al.,

Plaintiffs,

v.

REPUBLIC OF IRAQ, et al.,

Defendants.

August 6, 2003, Decided

OPINIONBY: RICHARD W. ROBERTS

OPINION:

MEMORANDUM OPINION AND ORDER

Plaintiffs, former prisoners of war ("POWs") during the Gulf War in 1991 and family members of those POWs, were awarded final judgment against defendants Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service. The United States has filed a post-judgment motion to intervene in order to raise Iraq's newly restored sovereign immunity as a challenge to the Court's subject matter jurisdiction and

to move to vacate the final judgment in this case. Because the United States is not entitled to intervene as a matter of right or permissively, its motion to intervene will be denied.

BACKGROUND

The factual background of this case is set forth fully in the Findings of Fact and Conclusions of Law entered July 7, 2003. See Acree, et al. v. Republic of Iraq, et al., 271 F. Supp. 2d 179, 2003 U.S. Dist. LEXIS 11421, __ F. Supp. 2d __, 2003 WL 21537919 (D.D.C. July 7, 2003). Briefly, the plaintiff POWs were brutally tortured by agents of Saddam Hussein's Iraqi government, causing severe and long-lasting mental and physical injury. The Iraqi agents refused to notify the International Committee of the Red Cross of the POWs' capture and condition, causing prolonged anguish and injury to the family members of the POWs.

Plaintiffs filed this lawsuit on April 4, 2002. After they obtained proper service of process on defendants and defendants failed to appear, the Clerk of Court entered default on September 25, 2003. On March 31, 2003, plaintiffs submitted evidence to support their cause of action against defendants and their claim for damages. The Court thoroughly and carefully reviewed plaintiffs' evidence and ascertained that Iraq, Saddam Hussein, and the Iraqi Intelligence Service were covered by the waiver of sovereign immunity contained in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (2000) ("FSIA"). On July 7, 2003, the Court entered final judgment in favor of plaintiffs against the Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service, and awarded damages.

Appendix B

On July 18, 2003, plaintiffs filed a separate lawsuit in this Court seeking to satisfy their judgment from certain Iraqi bank accounts located in this country that the federal government had previously seized. See Acree, et al. v. Federal Reserve Bank of New York and John Snow, Civil Action No. 03-1549 ("Acree v. Snow").[1] The Court granted a temporary restraining order ("TRO") in that case to preserve the status quo pending a consolidated hearing on the merits of the parties' motions for summary judgment and the plaintiffs' application for a preliminary injunction. Following a hearing in that case on July 29, 2003, the Court granted defendant's motion for summary judgment, holding that the Court could not require the United States to make available to plaintiffs any portion of the seized Iraqi funds.

On July 21, 2003, the Monday after plaintiffs obtained the TRO in Acree v. Snow, the United States filed its motion to intervene in this case. The United States claims that it seeks to intervene in order to ensure the successful establishment of a democratic government in Iraq. The United States also claims that it has an interest in protecting the seized Iraqi assets which were the subject of the Court's ruling in Acree v. Snow and in effectuating the intent of Congress and the President with respect to lawsuits against Iraq.

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1. Plaintiffs later dismissed the Federal Reserve Bank of New York, leaving Treasury Secretary John Snow as the only remaining defendant.

Appendix B

DISCUSSION

I. TIMELINESS

Intervention, both as a matter of right and permissive, requires that the application be timely. Fed. R. Civ. P. 24(a), (b). An untimely motion to intervene "must be denied." NAACP v. New York, 413 U.S. 345, 365, 37 L. Ed. 2d 648, 93 S. Ct. 2591 (1973). "Timeliness is measured from when the prospective intervenor knew or should have known that any of its rights would be directly affected by the litigation." Roeder v. Islamic Republic of Iran, 333 F.3d 228, 233 (D.C. Cir. 2003). Whether a motion to intervene is timely is to be evaluated based on all the circumstances present in the case, including "the time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." Smoke v. Norton, 346 U.S. App. D.C. 277, 252 F.3d 468, 471 (D.C. Cir. 2001) (quoting United States v. AT&T, 206 U.S. App. D.C. 317, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). Timeliness "is to be determined by the court in the exercise of its sound discretion[.]" Associated Builders and Contractors, Inc. v. Herman, 334 U.S. App. D.C. 285, 166 F.3d 1248, 1257 (D.C. Cir. 1999) (quoting NAACP, 413 U.S. at 366). A post-judgment motion to intervene "will usually be denied where a clear opportunity for pre-judgment intervention was not taken." Associated Builders, 166 F.3d at 1257.

On April 16, 2003, Congress authorized the President to "make inapplicable with respect to Iraq . . . any other

provision of law that applies to countries that have supported terrorism." Emergency Wartime Supplemental Appropriations Act, § 1503, Public Law 108-11, 117 Stat. 579 (April 16, 2003) (the "Act"). In this case, the United States claims that it did not need to intervene until the President exercised the authority granted to him by Congress in the Act and issued a Presidential Determination on May 7, 2003 making "inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism." Presidential Determination No. 2003-23 of May 7, 2003 (the "Determination").

Accepting the government's argument that the timeliness of its motion to intervene should be evaluated from the May 7 Presidential Determination, it is uncontroverted that the United States was well aware on that date that this case was pending. It is also undisputed that the United States waited significantly more than two months after May 7 and almost two weeks after the Court entered final judgment before it moved to intervene.[2]

The 75-day delay in this case — 13 days of which were postjudgment after the government had a two-month opportunity to file the motion pre-judgment — is a more lengthy delay than existed in the cases involving pre-judgment motions relied upon by the United States.

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2. Indeed, the United States did not move to intervene in this case until after plaintiffs obtained a TRO in an attempt to satisfy their judgment from seized Iraqi assets. Although the timing of the United States' motion could be viewed as retaliation against plaintiffs for obtaining the TRO, the Court does not find that the government's motion to intervene is retaliatory.

See Roeder, 333 F.3d at 233 (government moved to intervene before judgment and less than 30 days after receiving notice of unprotected right); National Wildlife Federation v. Burford, 278 U.S. App. D.C. 320, 878 F.2d 422, 434 (D.C. Cir. 1989) (pre-judgment motion to intervene filed 73 days after applicant became aware of unprotected right was timely as to that claim), rev'd on other grounds, 497 U.S. 871, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990); see also Fund for Animals, Inc. v. Norton, 322 F.3d 728, 735 (D.C. Cir. 2003) (pre-judgment motion to intervene which was filed within two months and before answer filed was timely). The United States has not cited, and the Court is not aware of, any case in which this circuit has overruled a timeliness challenge to a post-judgment motion to intervene in which the applicant inexplicably failed to file its motion during the two months between the date it became aware of its asserted threatened interest and the entry of final judgment and which was filed 75 days after the applicant became aware of its asserted unprotected interest.

Moreover, the 75-day delay in this case is significantly greater than the 17-day delay in NAACP v. New York. In that case, the applicant claimed that it first learned on March 21, 1972 that its cognizable interests were not adequately protected. The applicant did not file its motion to intervene until April 7, 1972, and the Supreme Court held that the 17-day delay rendered the motion untimely. NAACP, 413 U.S. at 369.

The United States offers no explanation for its 75-day delay in filing its motion to intervene. More importantly, the United States offers no explanation for its failure to seek

intervention during the two months between the May 7 Presidential Determination and the entry of final judgment on July 7, 2003. Considering all of the circumstances in this case, the motion to intervene — filed 75 days after the May 7, 2003 Presidential Determination on which the United States bases its motion and almost two weeks after final judgment — was untimely.

Where, as here, a motion to intervene is untimely, "there is no need for the court to address the other factors that enter into an intervention analysis." See Associated Builders, 166 F.3d at 1257; see also NAACP, 413 U.S. at 369 (the court's finding that the motion to intervene was untimely "makes it unnecessary for us to consider whether other conditions for intervention under Rule 24 were satisfied"). Nonetheless, for purposes of a full record, the remaining factors relevant to the merits of the government's motion to intervene will be addressed.

II. INTERVENTION AS A MATTER OF RIGHT

Intervention as a matter of right should be granted when "the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a). Intervention under Rule 24(a) requires "(1) timeliness; (2) a cognizable interest; (3) impairment of that interest; and (4) lack of adequate representation by existing parties" to protect that interest. Smoke, 252 F.3d at 470 (quoting

Williams & Humbert, Ltd. v. W & H Trade Marks, Ltd., 268 U.S. App. D.C. 192, 840 F.2d 72, 74 (D.C. Cir. 1988)). A motion to intervene as a matter of right under Rule 24(a) can properly be denied if the applicant fails to satisfy any one of these requirements. Securities & Exchange Comm'n v. Prudential Securities, Inc., 329 U.S. App. D.C. 10, 136 F.3d 153, 156 (D.C. Cir. 1998).

The United States identifies several interests as bases for intervention in this lawsuit. One interest is an interest in the seized Iraqi assets from which plaintiffs seek to satisfy their judgment. These Iraqi assets, however, are not the subject of this lawsuit. Additionally, the government's ability to protect the seized Iraqi assets from attachment by plaintiffs has not been impaired or impeded in any way. Indeed, the seized Iraqi assets in which the United States claims an interest were the subject of a separate civil action filed in this Court, Acree v. Snow, Civil Action 03-1549, in which the government was a represented party and which has been resolved in the government's favor.

Other interests claimed by the United States are interests in promoting a new, democratic Iraqi government and in ensuring that courts act only if there is subject matter jurisdiction.[3] Promoting democratic governance is clearly a worthy goal, but the government does not explain how the

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3. However, the government has made no similar effort to intervene in Hill v. Republic of Iraq, 175 F. Supp. 2d 36 (TPJ) (D.D.C.), in order to promote a democratic Iraqi government and to argue that the court lacks subject matter jurisdiction in that pending case brought by American civilians held hostage and used by Iraq as "human shields" during the 1991 Gulf War.

existence of an adjudication of liability against Iraq, Saddam Hussein and the Iraqi Intelligence Service for the torture of American POWs can interfere with that interest. There is nothing in the record to indicate that the existence of the judgment in this case may as a practical matter impair or impede the government's current efforts to promote a democratic government in Iraq especially now that Saddam Hussein's regime has ended.[4]

The United States' claimed interest in ensuring that courts act only with proper subject matter jurisdiction is an interest the United States should have generally in every case. It is not an independent basis for intervention as of right under Rule 24(a). Moreover, the government's interest in having federal courts act only with proper subject matter jurisdiction will not be impaired or impeded in the absence of the government as a party because a court has an obligation to determine *sua sponte* whether it has such jurisdiction. See Murphy Exploration & Prod. Co. v. United States DOI, 346 U.S. App. D.C. 282, 252 F.3d 473, 479-80 (D.C. Cir. 2001).

The Court's subject matter jurisdiction in this case was based on 28 U.S.C. § 1330, which provides for original jurisdiction over civil cases against a foreign state in which the foreign state is not entitled to immunity. It is undisputed that at the time this lawsuit was filed, the sovereign immunity of Iraq, Saddam Hussein, and the Iraqi Intelligence Service

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4. Arguably, the contrast between the behavior of the autocratic regime under Saddam Hussein which resulted in the adjudication of liability in this case and that of a democratic government which does not engage in torture could benefit the United States' efforts to promote the new government in Iraq.

had been waived under the FSIA and the Court had subject matter jurisdiction. Seeking to assert Iraq's now-restored sovereign immunity would be for naught. "Sovereign immunity, once waived, cannot be reasserted." Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1287 n.18 (11th Cir. 1999); see also Rodriguez v. Transnave, Inc., 810 F. Supp. 194, 196 (S.D. Tex.), rev'd on other grounds, 8 F.3d 284 (5th Cir. 1993); Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824, 826 (D.D.C. 1978).[5] As a result, § 1503 of the Act and the Presidential Determination could not operate for purposes of this lawsuit to restore Iraq's sovereign immunity which had previously been waived. This conclusion comports with the rule that "absent a clear statement to the contrary, legislation should not . . . be interpreted to oust a federal court's . . . jurisdiction over a present case." Daingerfield Island Protective Society v. Lujan, 287 U.S. App. D.C. 101, 920 F.2d 32, 36 (D.C. Cir. 1990), cert. denied, 502 U.S. 809, 116 L. Ed. 2d 31, 112 S. Ct. 54 (1991).

Even if the Presidential Determination operated to restore Iraq's previously-waived sovereign immunity in this case, the defense of sovereign immunity could be asserted only by Iraq, not by the United States. See Aquamar, 179 F.3d at 1290 ("parties other than a foreign sovereign ordinarily lack standing to raise the defense of sovereign immunity" but the court may address the issue independently); Wilmington Trust v. United States District Court, 934 F.2d 1026, 1032-33 (9th Cir. 1991) (noting that prior to the enactment of the FSIA, the State Department would make the suggestion of sovereign

5. Although the cited cases involved § 1605(a)(1) of the FSIA, the reasoning can be applied to § 1605(a)(7).

immunity for a foreign state but that "Congress intended requests for protection under FSIA to originate from the foreign state party"), cert. denied, 503 U.S. 966, 118 L. Ed. 2d 220, 112 S. Ct. 1578 (1992). The United States has stated unequivocally that it "is not acting on behalf of Iraq[.]" See Motion to Intervene, at 1.

Additionally, even if § 1503 of the Act and the Presidential Determination could reassert sovereign immunity in this lawsuit, the Act and the Presidential Determination mention only Iraq. Neither the Act authorizing the Presidential Determination nor the Presidential Determination itself mentions Saddam Hussein or the Iraqi Intelligence Service either by name or by description and, therefore, neither purports to restore sovereign immunity for those two defendants. If Congress and the President want to absolve Saddam Hussein and the Iraqi Intelligence Service of liability for having tortured the POW plaintiffs, they must do so specifically. On issues of sovereign immunity, the Court is "bound to infer that [Congress] intended no more than it said." See Brown v. Secretary of the Army, 316 U.S. App. D.C. 284, 78 F.3d 645, 650 (D.C. Cir.), cert. denied, 519 U.S. 1040 (1996). As a result, even if Iraq's sovereign immunity could be restored in this case and even if the United States could raise the defense of sovereign immunity on behalf of Iraq, the Court would still have had subject matter jurisdiction on July 7, 2003 to enter final judgment against Saddam Hussein and the Iraqi Intelligence Service.

Appendix B

III. PERMISSIVE INTERVENTION

An applicant may be permitted to intervene under Rule 24(b) when its "claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). When considering an application for permissive intervention, the Court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Id. "As its name would suggest, permissive intervention is an inherently discretionary enterprise." Equal Employment Opportunity Comm'n v. National Children's Center, Inc., 331 U.S. App. D.C. 101, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

The United States argues that its challenge to the Court's subject matter jurisdiction based on the defense of Iraq's restored sovereign immunity is a question of law that it has in common with the main action. Iraq's sovereign immunity, however, is not "the applicant's claim or defense." Instead, as is noted above, it is a defense that can be asserted only by Iraq.

Because the Court can address its subject matter jurisdiction *sua sponte* and has done so in this Memorandum Opinion, allowing the United States to intervene in this closed case to challenge the Court's jurisdiction would cause undue delay and prejudice to the existing parties by prolonging litigation that is now over.

Appendix B

CONCLUSION AND ORDER

Because the United States' motion to intervene is untimely, because the United States does not claim an interest which may be threatened by the judgment in this case, and because the United States' claimed interests are adequately protected, the United States is not entitled to intervene as a matter of right in this case. Because post-judgment intervention by the United States for the purpose of filing a meritless motion to vacate the judgment for lack of jurisdiction would cause unreasonable delay in the final resolution of this lawsuit and would cause prejudice to the plaintiffs who are entitled to finality in their judgment, permissive intervention will not be granted. Accordingly, it is hereby

ORDERED that the United States' Motion to Intervene [38] be, and hereby is, **DENIED**.

SIGNED this 6th day of August, 2003.

RICHARD W. ROBERTS

United States District Judge

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED JULY 7, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. CIV.A. 02-632 (RWR)

Clifford ACREE, et al.,

Plaintiffs,

v.

The REPUBLIC OF IRAQ, et al.,

Defendants.

July 7, 2003.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ROBERTS, District Judge.

Plaintiffs, former prisoners of war ("POWs") during the Gulf War in 1991 and their close family members, filed this lawsuit under the Foreign Sovereign Immunities Act ("FSIA"), *28 U.S.C. § 1602, et seq.* (2000). Plaintiffs seek damages for the injuries they allege they suffered as a result of the torture inflicted on the POW plaintiffs while in Iraqi captivity. The Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service were properly served pursuant to *28 U.S.C. § 1608* and are in default. Based on a thorough

review of the full record in this case,[1] the Court makes the following findings of fact and conclusions of law in support of final judgment against defendants and an award to plaintiffs of compensatory and punitive damages.

BACKGROUND

Seventeen of the twenty-one American troops held captive by Iraq during the first Gulf War and thirty-seven of their immediate family members filed this lawsuit against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his official capacity, alleging personal injuries suffered by the POWs caused by torture during their captivity, and suffered by their family members resulting from the acts of torture inflicted on their loved ones. Plaintiffs seek compensatory damages for bodily injury, emotional distress, economic injury, pain and suffering, and solatium. They also seek punitive damages to prevent future mistreatment of American POWs and their families.

The Court has jurisdiction over this action against a foreign state under *28 U.S.C. § 1330*. Foreign states have no immunity from lawsuits seeking monetary damages for personal injuries caused by an act of torture or the provision of material support or resources for such torture by a state designated as a state sponsor of terrorism at the time the torture occurred, if such act or provision of material support is engaged in by an official or agent of such foreign state while acting within the scope of his or her office or agency.

1. The evidentiary record includes the affidavits filed by each plaintiff, the affidavits filed by plaintiff's experts, plaintiffs' medical records, and videotaped depositions of certain plaintiffs.

28 U.S.C. § 1605(a)(7). The Republic of Iraq was designated as a state sponsor of terrorism in September 1990, prior to the torture and mistreatment of American POWs and their family members of which plaintiffs complain here, and was so designated throughout the Gulf War in 1991.[2] The plaintiffs in this case are United States nationals, and they repeatedly offered defendants an opportunity to arbitrate their claims in accordance with accepted international rules of arbitration.

Plaintiffs effected service of process on defendants through the United States Interests Section of the Embassy of the Republic of Poland in Baghdad on July 22, 2002, pursuant to *28 U.S.C. § 1608*. Defendants were required by *28 U.S.C. § 1608* to file an answer or otherwise to respond within sixty days after proper service was made, but failed to do so. The Clerk of Court entered default against defendants on September 25, 2002. Both the Clerk of Court and plaintiffs' counsel notified the defendants of the existence and terms of the Court's scheduling order of December 20, 2002, which established a March 31, 2003 deadline for the submission of a statement on damages. Defendants neither filed a pleading contesting liability nor requested an extension of time to do so. Defendants received adequate notice of this lawsuit and of all deadlines, and they elected not to appear.[3]

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2. *See Determination Iraq, 55 Fed.Reg. 37,793 (Sept. 13, 1990)* (stating that "Iraq is a country which has repeatedly provided support for acts of international terrorism"); *15 C.F.R. § 746.3(b) (2002)*; *Daliberti v. Republic of Iraq, 146 F.Supp.2d 19, 25 (D.D.C.2001)*.

3. The Republic of Iraq did not lack an understanding of how to challenge a *§ 1605(a)(7)* action as it previously has done so in this district. *See Daliberti v. Republic of Iraq, 97 F.Supp.2d 38 (D.D.C.2000)*.

Appendix C

This Court cannot enter a final judgment by default against a foreign state or its political subdivisions, agencies or instrumentalities "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." *28 U.S.C. § 1608(e)*. Plaintiffs have submitted uncontroverted evidence that the defendants are liable for the torture of the POW plaintiffs and the intentional infliction of emotional distress on their family members. Plaintiffs have established their right to relief and to an award of damages by clear and convincing evidence which is satisfactory to the Court and which would permit a reasonable jury to find for the plaintiffs if this were a contested proceeding.

FINDINGS OF FACT

I. FACTUAL BACKGROUND

On August 2, 1990, the Republic of Iraq, acting at the direction of Iraqi President Saddam Hussein, attacked and occupied the State of Kuwait. In response, the United Nations ("UN") Security Council adopted Resolution 678, authorizing member states to use all necessary means to implement earlier UN Security Council Resolutions directing Iraqi forces to leave Kuwait. On January 16, 1991, an international coalition of thirty-three nations led by the United States initiated military action against Iraq.

Between January 17, 1991, and repatriation in early March of 1991, a number of coalition personnel, including the POW plaintiffs in this case, were held in Iraqi captivity. Most had been in aircraft that were downed over Iraq or Kuwait and several suffered injuries when their aircraft were downed.

Appendix C

Officials of the Republic of Iraq violently tortured all of the POW plaintiffs during their captivity. The POW plaintiffs were held for different periods of time and the specifics of their torture varied. Apparently because the Iraqi captors believed pilots had more sensitive information, the pilot POWs were tortured more severely than other POWs. The torture inflicted included severe beatings, mock executions, threatened castration, and threatened dismemberment. The POWs were systematically starved, denied sleep, and exposed to freezing cold. They were denied medical care and their existing injuries were intentionally aggravated. They were shocked with electrical devices and confined in dark, filthy conditions exposing them to contagion and infection. The POWs suffered serious physical injuries, including broken bones, perforated eardrums, nerve damage, infections, nausea, severe weight loss, massive bruises, and other injuries.

Iraqi agents caused the POWs to experience severe mental anguish by falsely reporting that they had killed Americans, including a pilot's wingman, other American POWs, and the President of the United States. The POWs suffered from knowing the agony that their families were enduring because the Iraqi authorities refused to inform the families that the POWs were alive. The Iraqi captors attempted unsuccessfully to degrade the POWs by urinating on them, and some POW plaintiffs were subjected to forced circumcision inspections to determine if they were Jewish. There is no indication that the POWs previously suffered from the extreme mental anguish and psychological harm that followed their captivity.

Appendix C

Iraq also used the POWs as "human shields" and held them captive in a legitimate military target. On January 21, 1991, only five days after the start of hostilities, Iraq announced this policy over Baghdad Radio. This was a profound source of anguish for the POWs' family members. When Allied forces bombed the regional Iraqi Intelligence Service Headquarters on February 23, 1991, not knowing that the POWs were incarcerated there, many of the POW plaintiffs narrowly escaped death.

The Iraqi torture of the POW plaintiffs was carried out in a common pattern of beatings upon capture and during captivity as punishment, beatings and other torture during extensive interrogations in an effort to extract information, random beatings unconnected to interrogations, and beatings in an effort to force the POWs to make verbal and videotaped statements and "confessions" to be used as propaganda.

No American POWs were permitted to notify their families of their capture and current state of health. As a calculated part of the torture of the POWs and their family members, Iraq refused all requests by both the POWs and the International Committee of the Red Cross ("ICRC") for notification of capture. For the POWs, this was a special dimension of the torture and mental anguish as they worried about their loved ones. Although the POWs did not opt for their captivity or torture, many experienced guilt for causing anguish to their families and friends. For spouses and other family members in the United States, Iraq's refusal to permit notification produced severe mental anguish. Several spouses did not know whether they were wives or widows. Other spouses who learned of their husband's capture through

released Iraqi propaganda tapes suffered mental anguish knowing that their loved ones would allow themselves to be videotaped only if severely tortured.

The POWs and their families have continued to suffer over the years since repatriation. For many, the physical and mental effect of the torture and mental anguish produced lasting damage. Some have permanent physical impairments. Some have undergone painful and extensive medical treatments in an effort to reverse the damage done by their captors in Iraq. All have suffered the effects of lasting emotional harm, whether to their marriages, their relationship with their families and friends, or their professional lives.

II. PLAINTIFFS

A. *POW Plaintiffs*

Colonel Clifford Acree

Col. (then-Lt.Col.) Clifford Acree's OV-10 "Bronco" aircraft was shot down by a surface-to-air missile in Kuwait on the first day of the war. He suffered a whiplash-like injury to his neck during the ejection procedure. Within minutes, he was taken prisoner by Iraqi soldiers. He was restrained with handcuffs that were so tight they cut off circulation and cut into his wrist bone, causing significant pain and causing his hands to swell and become numb. During his transportation to Baghdad, he was brutally beaten, often in time to music.

Appendix C

In Baghdad, interrogations and brutal beatings continued around the clock for several days, each episode lasting from twenty minutes to an hour. Col. Acree was threatened with death if he did not cooperate. He was struck with fists and other instruments to his entire upper body, but his captors cruelly focused on his injured neck. Because he was blindfolded, he never knew where the blows were coming from. The beatings were so frequent, however, that he learned to distinguish between the sound of a closed fist and that of other weapons. He also had to endure the agony of hearing other POWs being tortured.

His captors determined that he was a lieutenant colonel and a squadron leader, and they correctly assumed he had important, detailed military information. At that point, the interrogations and beatings became worse. The Iraqi captors tortured him violently in a futile attempt to extract valuable strategic information. Often, the beatings ended only when he was rendered unconscious. Despite the relentless torture, Col. Acree refused to provide information that would have endangered the Allied forces.

Col. Acree's captors also tormented him with stories of torture they had inflicted on POWs in the Iran-Iraq war. One interrogator told him about the interrogation of an Iranian pilot, in which they had taken a period of three days to cut off one of his testicles. When Col. Acree was later subjected to an inspection to determine if he was circumcised, he feared that he would suffer the same fate as the Iranian pilot.

The guards beat Col. Acree's head with such force that they broke his nose and fractured his skull. After the first

few days of torture, he could not walk without assistance. The guards subjected him to mock executions and injected him with an unidentified drug during an interrogation. They forced him to make a propaganda video, but he refused to read the scripted message and, instead, merely sent a message intended to let his wife and family know that he was alive. He steadfastly refused to denounce the president or the Allied effort and, as a result, he was beaten even more severely.

Col. Acree was held in a freezing, dirty cell at the Iraqi Intelligence Service regional headquarters. His diet was so meager that he lost approximately 30 pounds during his captivity. Death from starvation alone was likely had the war lasted much longer. To survive, he ate a small piece of soiled bread he found behind the toilet and he ate the scabs off his own body. He developed conjunctivitis, lice infestation, and a severe intestinal disorder from the unsanitary conditions.

The building in which Col. Acree was held, a legitimate military target, was bombed by Allied forces on February 23, 1991. Col. Acree survived the bombing—a bombing which probably prevented the threatened dismemberment he was to have suffered the next day.

During his forty-seven days in captivity, his status as a POW was never reported by Iraq. The fear he experienced throughout his captivity that his wife had been given no information about his capture and status as a POW unfortunately was well founded.

Appendix C

Following his release, Col. Acree experienced insomnia and outbursts of anger. He feared losing control of his behavior. He believes that his marriage was affected by his impatience, his reduced emotions, and his reluctance to depend on anyone else. He had to undergo four painful reconstructive surgeries to repair his shattered nose and septum and broken facial bones, and to align airways in his skull. Each surgery brought back vivid flashbacks of the torture endured while in captivity in Iraq. As a result of having his nose repeatedly bludgeoned by his captors, he completely lost the sense of smell for several years, and it remains impaired to this day.

Col. Acree's hands remained numb for months after his release. He still suffers ongoing numbness in two fingers of his right hand from the Iraqi torture. He also has a rapid heart beat during medical exams and physical exercise. He has considerable hearing loss, and sudden noises startle him. His neck often becomes stiff and sometimes produces sharp pains, incapacitating him for two to five days at a time.

In 1992, Col. Acree was diagnosed with Post-Traumatic Stress Disorder ("PTSD") arising from his mistreatment in Iraq. In 1998, while on assignment to NATO, he suffered what was diagnosed as a Major Depressive Episode coincident with a recurrence of PTSD. He returned to the United States, where he was placed on medical leave during seven months of psychiatric treatment. He still suffers a number of problems caused by his captivity, including rapid and irregular heartbeat, low back pain, night sweats, headaches, nervousness when stressed, irritability when tired, numbness and tingling in his upper extremities, and some hearing loss and tinnitus.

Appendix C

The mistreatment of Col. Acree by his captors has significantly reduced the quality of his life during the twelve years since his release. He is not the same person he was before he became a POW, and has not been able to return to full mental and physical health. As a result, he will always suffer the consequences of his captors' inhumane treatment.

Lt. Colonel Craig Berryman

The Harrier aircraft piloted by Lt. Col. Craig Berryman was shot down near Kuwait City on January 28, 1991. His wingman reported seeing the plane hit the ground and explode, but he did not see a parachute emerge and believed Lt. Col. Berryman had died in the crash.

Upon his initial capture, Lt. Col. Berryman was beaten by Iraqi soldiers using their fists and rifle butts. He was then taken to a series of bunkers in Kuwait for interrogation. One of his interrogators commented that Lt. Col. Berryman's failure to make radio contact meant that he was presumed dead and, therefore, his captors could kill him with impunity. As a result, Lt. Col. Berryman was extremely concerned that his family would never know what happened to him. When he continued to refuse to answer questions during an interrogation, his captors knocked him to the ground, cuffed his hands behind his back, and then jerked him up roughly by the chain linking his handcuffs, making them as tight as possible.

When the guards brought him out of the interrogation bunker, a number of Iraqi soldiers punched, kicked, and spit on him. While waiting in an Armored Personnel Carrier that

would transport him to Basra, Lt. Col. Berryman felt a guard's fingers running through his hair as if part of a sexual advance. Blindfolded and handcuffed, he was helpless to prevent any assault that might ensue. At that point, two more guards entered the vehicle and began beating Lt. Col. Berryman's head. To ensure that Lt. Col. Berryman would take the full impact of each punch, one guard held Lt. Col. Berryman's head against the guard's knee while the other two guards punched him. That prevented him from using protective techniques he had learned as a boxer in college.

At Basra, Lt. Col. Berryman was inspected to determine whether he was circumcised, and he was questioned about his religion. When he answered that he was a Baptist, his captors called him a "lying Jew." A guard then hit his left leg below the knee with an instrument that felt like a heavy club. Lt. Col. Berryman immediately collapsed in excruciating pain—this blow had broken the fibula in his left leg. Another guard then used a similar club to attack his right leg. The two guards continued beating him as he rolled on the floor trying to protect his left leg.

As he continued to resist answering their questions, Lt. Col. Berryman was told that if he did not answer their questions they would break his other leg. Two guards pinned him to the wall and one kicked his left leg, causing him to collapse to the ground in pain. The others began kicking and beating him. One guard used a steel-toed boot to kick a piece of flesh out of Lt. Col. Berryman's leg, exposing the bone. A lit cigarette was then pressed several times against his forehead and then pressed against his nose and each ear. The cigarette was then crushed out in an open wound in his neck.

Appendix C

Once in Baghdad, Lt. Col. Berryman was thrown into a prison cell from which he could clearly hear other American POWs being beaten by Iraqis. These were among the worst sounds he remembered from his experience while a captive of Iraq, both because it was excruciating to hear a fellow human suffering and because he knew that it would soon be his turn to be beaten again. Indeed, his cell door soon opened and two Iraqis entered. The larger one kicked his left leg and punched him. After about five minutes of continuous beating, these Iraqis left his cell and moved on to the prisoner in the adjacent cell. This cycle repeated itself two more times. During the last session, Lt. Col. Berryman asked the Iraqis what they wanted. They replied simply and coldly that they wanted to kill him, and then they continued beating him. Lt. Col. Berryman feared for his life every moment he was held captive in Iraq.

The next day, he was taken to what the POWs referred to as the "Biltmore," where he was kept in solitary confinement in a six-by-ten-foot cell with almost no light and a non-functioning toilet. He was fed a starvation diet of two scoops of broth and two small pieces of pita bread each day. He was given only two thin blankets for protection against the freezing Baghdad nights. After several weeks, he began to lose feeling in his hands because of the severe cold. He lost 25 pounds during the thirty-seven days he was in Iraqi captivity.

The interrogations continued at the Biltmore. They varied in length from a few minutes to hours. On two occasions, he was forced to make videotaped statements. The beatings during these interrogations also continued. In addition to their

fists, the guards often used instruments, including rubber hoses, clubs, and pistol barrels. At one point, the interrogator placed a gun to Lt. Col. Berryman's head and told him that if he did not answer the remaining questions correctly, he would die.

At another interrogation session, his hands were held on the table in front of him. The interrogator stuck a knife between two of Lt. Col. Berryman's fingers and announced that he would have to answer five questions. He was told that for each answer deemed insufficient his interrogator would cut off a finger. Lt. Col. Berryman's fear at that point was so overwhelming that he was unable to answer any question. He was then told he would have a similar interrogation several days later.

He was spared that particular torture when the Biltmore was bombed by Allied forces. He was moved to a civilian prison, dubbed "Joliet" by the POWs, where he contracted dysentery that plagued him for years after his return to the United States and still continues to cause a number of problems.

Only after his release did he begin to receive appropriate medical attention for his broken leg and other injuries. Every day of his life, Lt. Col. Berryman thinks about the torture he experienced in Iraq. Nightmares about his time there continued for months after his return to the United States. He was grounded from flight status during this time. To this day, he cannot tolerate anyone touching his wrists because nerve damage from the handcuffs he wore has never fully healed.

Appendix C

As a result of his treatment in Iraq during his captivity, Lt. Col. Berryman developed PTSD. Although his symptoms have fluctuated, he continues to meet criteria for the full disorder. He also suffers symptoms of chronic depression including loss of pleasure, social withdrawal, and nihilistic feelings. These symptoms have seriously affected his family life. He is more withdrawn, more solitary, and less trustful now than before his torture by Iraq while held as a POW. This emotional shift inward caused a great strain to his marriage that he and his wife have resolved only with significant effort.

His POW experience had a negative impact on his career, causing a two-year delay in his promotion to Lieutenant Colonel. As a result, he earned $70,000 less than if he had been promoted on schedule, a loss attributable to the mistreatment he received while a POW.

Former Sergeant Troy Dunlap

On February 27, 1991, then-Sergeant Troy Dunlap was on a search-and-rescue mission in a Blackhawk helicopter when it was shot down over Iraq. He survived the violent crash, along with U.S. Army Major Rhonda Cornum and U.S. Army Staff Sergeant Daniel Stamaris. Iraqi troops quickly captured him and Major Cornum, while abandoning the severely wounded Staff Sergeant Stamaris at the crash site. During his capture, the soldiers spit on him and kicked him while a guard said in English for the soldiers to "kill him." A soldier put the barrel of a gun to his head and pressed it into his skull. Slowly, he pulled the trigger until it clicked. After the click, his captors laughed loudly at his anguish. Then they started kicking and spitting on him again.

Appendix C

Dunlap was eventually taken to an underground bunker complex where he underwent his first interrogation. The interrogators, seeking details of his mission, pounded his head with a pistol whenever he gave answers they did not like. One of the men then threatened to harm to Major Cornum. During this interrogation, he was asked if he was Jewish.

He was later taken to a town where his guards allowed civilians to hit him and spit on him. One of the civilians spit in his face and grabbed his nose, pinching it until the pain was unbearable. The guard then punched him in the teeth.

That night, Dunlap was locked in a small room tied to a chair with his hands bound behind his back. The only light was from a lantern the guards carried. The guards placed a fuel-soaked blanket over his body up to his neck and laughed as they lit matches and threw them around his chair. His tormentors left momentarily, then returned and placed what appeared to be dates on the blanket. Just as he was trying to devise a way to eat the dates without the use of his bound hands, the guards urinated on the dates.

The next day, Dunlap was taken to an abandoned office where he was left to be watched by a child around the age of ten or twelve who was told, "If he moves, kill him!" For the next three or four hours he stared at the wall, fearing the child would shoot him and claim that he had tried to escape.

He was then moved in a truck to another prison. During the trip, he was punched repeatedly in the stomach and slapped by the guards. When he arrived at what he believes was the prison the POWs called the Joliet, he was thrown

into a cold, damp cell. The guards at the prison frequently kicked him and hit his head with their guns.

Dunlap was then taken to another prison where more interrogations took place. His cell there was even smaller than the one at Joliet. He was on a cold concrete floor, had no boots, and had to use a coffee can as a toilet. The guards often told him they needed his home address for the bombs they would send his family. The also said they would send him home one piece at a time.

During one of the interrogations, the guards put scorching hot spoons on the back of his neck each time they did not believe his answers. They threatened to cut off his fingers, and they kept telling him that they would hurt Major Cornum if he did not cooperate. During these interrogations, the guards repeatedly kicked him, hit his head with pistols and rifle butts, and threatened to kill him.

During his seven days in Iraqi captivity, Dunlap lost 18 pounds due to the starvation diet to which he was subjected. The unsanitary conditions he endured also resulted in intestinal problems, including dysentery.

Former Sergeant Dunlap continues to have nightmares—on average twice per week—about his torture in Iraq. His nightmares usually include Arabic shouting, gunfire and bright lights. He suffers from sleeplessness, a loss of patience, and flashbacks to his experience in Iraq. Shortly after his release, he felt a major change in himself. He was easily frightened and he became isolated.

Appendix C

He has been diagnosed with PTSD. Although he had been awarded the Bronze star with valor, the Purple Heart, and a POW medal, he was discharged from the Army in October 1992 because of a pattern of misconduct that was possibly a symptom of his PTSD. He was later divorced from his wife, who felt he had changed and who was afraid of him because of his nightmares. He continues to suffer from PTSD with severe impairment in his mood and interpersonal functioning.

Colonel (Ret.) David Eberly

Col. David Eberly was shot down over northwest Iraq on January 19, 1991, and lost consciousness as he ejected. When he awoke, he and his crewmember headed for the Syrian border. As they approached an apparently deserted shack to seek shelter from the cold, they were captured by Iraqi soldiers who hit them repeatedly before throwing them into the back of a truck.

Col. Eberly was paraded through a small town and exposed to angry mobs. Once, while handcuffed in the back seat of a small car, he was attacked by civilians waving sticks and trying to overturn the vehicle. One threw a grapefruit-sized rock through the window behind him.

In Baghdad, he was taken to a video studio and was hit in the head when he did not provide the answers about the war that his captors sought for propaganda purposes. The main interrogator demanded that he cooperate, putting a gun to his head and saying, "You answer my questions or you die, here." He pulled the trigger on an empty chamber.

Appendix C

On January 31, Col. Eberly was taken to the Biltmore, which he learned on return to the United States was the Iraqi Intelligence Headquarters. There he was thrown into an empty cell with no cot, no light, and no heat. He was forced to use a non-functioning toilet in his cell. He slept on the concrete floor with only one blanket for protection from the cold. His daily diet was generally one ladle of broth and a piece of pita bread, but on some days he received nothing. Water was rarely offered.

A second forced propaganda video session was held with Col. Eberly shivering and bleeding, and more interrogations followed. One of his captors' most frequent means of torture was to hit the side of his head, trying to burst an eardrum. During several other interrogations, guards held a pistol to his head and pulled the trigger. On another occasion, he was forced to undergo an inspection of his genitals. This caused him absolute terror, as he had heard of Iraqi mutilations of Iranian prisoners. As the ranking POW, however, he continued to plead for better treatment for the POWs, asking that they be given medical attention, water, food, and blankets.

On February 23, Allied forces bombed the Biltmore, and the POWs were moved to another prison. The conditions at the new prison were extremely unsanitary, resulting in severe gastro-intestinal problems for Col. Eberly.

At the time of his eventual release, his abdomen was sunken and the skin on his chest and legs hung in folds. During the forty-six days he spent in captivity, he lost approximately 45 pounds, over 31% of his body weight.

Appendix C

Col. Eberly's transition back to life as a free person was marked by his impatience to return to a productive leadership role at work. The transition was slow and disconcerting. He continues to suffer mental torment from his facial scars and the torture he endured as a prisoner in Iraq. He is less patient now than before his inhumane treatment and he avoids personal confrontations.

He suffers great continuing stress as his family members, especially his son, continue to cope with the trauma endured from his time as a POW. His wife sought psychological counseling and is still being treated for issues related to this experience. The lingering effects on his family have a negative impact on Col. Eberly's well being. His prognosis is guarded, and it is unclear how much of the psychological damage he has suffered can be mitigated, even with treatment.

Lieutenant Colonel (Ret.) Jeffrey D. Fox

On February 19, 1991, Lt. Col. Jeffrey Fox's A-10 aircraft was shot down over southern Iraq. He was injured during his ejection, including damage to his right arm, right knee, and compression fractures in his back. He immediately used his radio to call for rescue, but he was captured by Iraqi soldiers before help could arrive. He was taken to a room where he was blindfolded, handcuffed, and tied to a chair. His captors struck him, breaking his eardrum and knocking him to the floor. They continued to beat him with their hands and other instruments, ordering him not to yell in pain.

He was later transported, handcuffed and blindfolded, in the trunk of a vehicle. At this point, he had a torn knee

ligament, a broken ear drum, and pain in his back, arms, and legs. After he was thrown into the trunk, he was hit on the head and legs. He was taken to an unknown location where he underwent a lengthy interrogation by several Iraqis in civilian attire. The interrogators accused him of being an Israeli fighter pilot and they conducted inspections to ascertain whether he was circumcised. In addition to the degrading nature of the inspections, this incident produced intense anxiety about being executed or more severely tortured.

Lt. Col. Fox was then taken to the Biltmore prison, where he suffered severe beatings and was informed that he was to be released to the people in the streets who would kill him with a knife. At the Biltmore, he was regularly beaten on his badly injured right knee, as well as on his legs and back. He sustained blows to his head and kicks to his legs and groin.

Lt. Col. Fox was kept in solitary confinement in a small concrete cell. He had to sleep on the floor by a broken toilet with only one blanket to protect him against the cold and damp. There were no lights and no access to water or a functioning toilet. Each day his captors fed him only a single ladle of thin red soup, sometimes with a piece of bread. He was given minimal drinking water. He spent his time in the corner of the cell with the blanket over him, and he prayed constantly.

During the interrogations, his Iraqi captors tried to force information out of him by hitting him on his face and body, sometimes with a fist and sometimes with a rubber mallet or

baton. They kicked him with their military boots and hit his injured right knee.

The beatings were recurrent, at least once each day. During one interrogation and beating, while handcuffed and blindfolded, he was told that he would be shot. Someone cocked a pistol behind him. Finally, the gun was discharged next to his right ear, exploding his ear drum.

The Biltmore, a military target, was bombed on February 23, 1991 by Allied forces unaware of the presence of the POWs. Lt. Col. Fox was then transported to Joliet, the civilian prison. On his arrival, he was taken into a courtyard and made to sit cross-legged. Being forced to remain in that position was intensely painful. Sanitary conditions at Joliet were unfit for humans. Lacking a toilet, he would at times urinate in his boot and pour the urine out of a small window. The water he was given was very dirty and he contracted giardia. The combination of disease and starvation caused him to lose approximately 25 pounds while he was a POW in Iraq. During his fifteen days of captivity, he was purposely deprived of medical care.

At Joliet, he was beaten at least twice more. On one occasion, he was asked questions while being videotaped for propaganda purposes.

While he was held as a POW by Iraq, Lt. Col. Fox wanted to notify the United States government, and through them his family, that he was alive. He was never permitted to do so. The fact that his family probably did not know what had happened to him, and might think that he was dead, was a terrible emotional burden.

Appendix C

Throughout the duration of his captivity, his distress was constant, and he was concerned that a guard would finally do too much damage to him. It was particularly frightening to hear the guards' footsteps in the hall and think they were coming for him.

Following his return to the United States, his physical and psychological problems have persisted, some to the present. He underwent surgery to repair the tympanic membrane damaged when the gun was fired next to his right ear, and he currently suffers from tinnitus, ringing, and some hearing loss.

The repeated kicks and beatings to his injured right knee caused him to require reconstructive surgery to his right anterior collateral ligament. Despite the surgery, and physical therapy over the years, his knee has never fully healed and he now needs a total knee replacement. He is regarded by the Veterans Administration as 40% disabled.

Lt. Col. Fox endured chronic diarrheal problems until at least April 1993 and has a low iron condition, both secondary to giardia. He has experienced pain in his shoulders and neck he attributes to being beaten there with the baton.

Following his release from Iraq, he noticed he had become unable to tolerate disagreement, especially in the workplace. The impatience caused by his experience as a POW had a negative impact on his career. He retired from the Air Force, was hired by Southwest Airlines, but soon quit. Subsequently, he worked in a number of jobs on a short-term basis. Currently, he would like to find a part-time job.

Appendix C

He still suffers from Subthreshold Posttraumatic stress disorder caused by the mistreatment he suffered while he was a POW in Iraq.

Chief Warrant Officer (Ret.) Guy Hunter

On January 18, 1991, CWO Guy Hunter and his pilot, then-Lt. Col. Acree, were shot down. CWO Hunter received a concussion and lost consciousness, and Col. Acree ejected them both. They were captured by Iraqi soldiers within five minutes.

At his first interrogation, when CWO Hunter refused to disclose military information, the cloth ties on his hands were replaced with handcuffs, clamped so tightly that his hands began to swell and he was in agony.

At what he believed to be an Army headquarters in Kuwait, CWO Hunter was kicked, hit, and beaten with batons on his head, sides, legs, and stomach. At one point, he was forced to kneel, and he remembers vividly the sound of a sword being drawn from a scabbard, giving him the distinct impression that the Iraqi soldiers were preparing to behead him.

On the way to Baghdad, he was repeatedly beaten by the guards and was interrogated in an attempt to obtain military information. At this time, his handcuffs were so tight his hands swelled. He remained in handcuffs for about five days, with only brief breaks to use the bathroom.

Appendix C

On arrival in Baghdad, he was interrogated two or three more times and was beaten into unconsciousness. If he did not answer questions to his interrogators' satisfaction, they would put a gun to his head and pull the trigger in a mock execution. CWO Hunter underwent a total of four mock executions as a POW.

During other interrogations, he was forced to sit on the concrete with his back to a concrete wall, still blindfolded and handcuffed. He clearly heard moans and shrieks coming from other cells. The beatings continued and he remained tightly handcuffed. He was asked the same questions he had been asked before, but with increasing brutality. He felt the barrels of guns placed against his head and stuck in his mouth. He heard the trigger pull sounds and gun slides being recycled next to his ear. After being gang-beaten to unconsciousness so many times, he was forced to make statements about "peaceful Iraq" for a propaganda videotape to be broadcast on international television.

Eventually, CWO Hunter was taken to another prison in Baghdad. An Iraqi military officer told him that he would never go home. A feeling of deep despair swept over him and he felt utterly isolated and alone. Most painful of all, he imagined his wife wondering day after day what had happened to him.

At the end of January, he was taken blindfolded and handcuffed to the Biltmore. He was asked several times if he was American, and at least twice he was beaten when he answered that he was. The interrogations were violent. He spent most of his time in prayer or thinking of his wife

and children and hoping they would have a good life if he did not make it back alive.

His cell had a broken toilet and water was severely restricted. He endured a raging thirst and had difficulty swallowing the piece of bread he was occasionally given. The only other sustenance he received was a small amount of red and watery liquid. He lost approximately 30 pounds due to his starvation diet as a POW in Iraq.

The cell had a bare concrete floor and was constantly dark and cold. He developed running sores on his thighs and his tail bone from lying on the concrete day and night. He suffered from persistent aches and pains. His eyes became infected and his only available option was to use his hands to wipe the sores in his eyes and then to rub the pus on the walls of the cell. He never received medical help.

He often heard other prisoners being taken from their cells and then heard them screaming with pain as they were beaten. Hearing the thump of clubs hitting a prisoner's body and the resulting moans seemed to freeze his mind in a stupor.

During his forty-seven days in captivity, CWO Hunter had a constant fear of permanent injury. During the interrogations, the men would hit him in the back of his head when they did not like his answers. He was beaten into unconsciousness at least ten times during captivity.

On February 23, 1991, his captors threatened to cut off one of his fingers for each unsatisfactory answer he gave at the next day's interrogation. He fully believed his captors

would follow through on that threat, but the Biltmore was bombed by Allied forces that night.

As he was transferred to Joliet, he was again beaten. It was very cold at Joliet and he had only one blanket. He shivered constantly.

The torture by Iraq has had serious lingering effects on the quality of his life. Following his release, CWO Hunter was easily frightened. His children became anxious around him and were occasionally frightened by his behavior and tenseness. He suffered with post-concussive syndrome caused by the many beatings to his head during captivity in Iraq. He has also suffered from tinnitus, some hearing loss, frequent and severe headaches, stiffness, swelling and pain in his hip and shoulder, dizziness, sleeplessness, night sweats, nervousness, and fatigue. He sustained permanent nerve damage from the severe handcuffing that still causes pain and numbness in both of his arms, from the elbow through his hands, and especially in his thumbs. At night, he tries to straighten his arms out to get relief, but the pain has not improved over time. The aches and pains, coupled with almost nightly nightmares, cause sleeplessness that leaves him constantly tired.

Today, he remains depressed. He takes Zoloft, but his nightmares still occur regularly. In addition, he is more irritable and has difficulty getting along with others. He is short with his family now and it hurts him that he could have been so changed by his POW experience.

Appendix C

CWO Hunter is currently suffering from PTSD and Alcohol Dependence caused by the mistreatment he suffered while he was a POW in Iraq. These disorders impaired his ability to adjust to civilian life after retiring from the Marine Corps in 1994. His future course, even with treatment, is guarded.

Sergeant David Lockett

Sergeant David Lockett was taken prisoner when his truck convoy ended up in the middle of the Iraqi Army. During his capture, he suffered a gunshot wound to the abdomen, with shards of metal lodged in his wound as well as in his chest and legs. Immediately after his capture, he was driven from camp to camp blindfolded and with his arms tied behind his back. At each camp, the soldiers would take turns hitting him on the knees with their weapons while spitting on him and laughing. When the soldiers noticed he had a gunshot wound in his abdomen, they punched him there with their fists and the butts of their weapons, making the bleeding more intense.

During his first interrogation, he was hit in his face when he did not provide requested military information. He was then tied to a chair while a number of Iraqis took turns hitting him with their fists and hitting his knees with their rifles and pistols.

Once while being transported to a new location, Sergeant Lockett grabbed one of the guards to prevent him from assaulting a female POW. The guard drew his pistol and pointed it at his head while another guard hit him on the

knees with his rifle. He was threatened with death if he did not stop this effort to assist his fellow POW. When Sergeant Lockett released his grip on the guard, the guards smashed his knees with their rifle butts and tied his hands even tighter. During his transportation from Basra to Baghdad, the guards hit him every time he appeared to be falling asleep. Some slapped his face and head, some pounded his knees with their rifles, and some punched him in the open wound in his stomach.

In Baghdad, he was placed in a dirty cell with nothing to protect him from the cold. The next morning, guards held him down while they attempted to remove the bullet in his abdomen without anesthesia. The pain was so intense that he thought he would pass out. Unable to remove the bullet, the guards hit him in the abdomen and tossed him a bandage.

During interrogations, guards used the butts of their weapons to beat Sergeant Lockett's knees. His interrogators sought information about his family and, when they learned he was married and had children, they asked him for his home address. They threatened that if he did not reveal his home address, he would never see his wife and children again.

He requested unsuccessfully that the ICRC be permitted to inspect the POWs' conditions. He wanted someone to notify his family, including his mother and his children. He was particularly concerned that his mother would be devastated if she were forced to wonder what happened to him.[4]

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4. When he went to see his mother in a mental hospital after his release, she became violent toward him because she thought he was playing a trick on her to make her think her son was still alive.

Appendix C

He was forced to make a videotape to denounce the war effort. He was told that if he did not cooperate, he would be put in a building due to be hit by coalition forces.

During his captivity in Baghdad, he was fed a starvation diet of soup and bread. He lost 39 pounds during the thirty-three days he was held as a POW by Iraq. He developed severe diarrhea but was never allowed to clean himself.

Following his release, he had surgery to remove the bullet in his abdomen and the remaining metal scraps from his chest. He continues to experience joint pain, especially knee pains from the numerous beatings and damage the Iraqi soldiers inflicted with their rifle butts. He continues to suffer pain in his shoulders and lower back. He tires easily. He has been diagnosed with hyperthyroidism linked to his starvation in Iraq. While his normal weight is 190 pounds, this medical condition kept him from achieving a weight over 155 pounds for at least eight years after his captivity.

Sergeant Lockett used anger to help him survive the torture, but he has not been able to control this anger since his return from captivity. Ordinary obstacles or minor changes at work frequently send him into a rage. He reacted angrily to his children's typical youthful behavior and was distressed that he could not control himself. The strain created by the changes in his personality eventually led to separation and divorce from his wife. This post-torture anger has caused him to lose interest in progressing in the military and hindered his progress through the ranks.

Appendix C

Sergeant Lockett suffered from PTSD in the months following his return from Iraq. At present, he has significant residual symptoms related to his captivity including diminished interest in activities and foreshortened future orientation. Due to these psychological symptoms, he has experienced severe disruptions in his personal and professional life and continues to require treatment.

Lieutenant Colonel H. Michael Roberts

Lt. Col. H. Michael Roberts's aircraft was shot down by a surface-to-air missile on January 19, 1991, and he was forced to eject just south of Baghdad. He was shot at by Iraqi forces during his parachute descent, and he was immediately captured when he landed. His captors took him to a nearby bunker and blindfolded him for an interrogation. Whenever he gave slow or unsatisfactory answers, his captors beat him with open hands, fists, and a club. His captors cut his head with repeated blows from their rifle butts and burst an eardrum with an open hand to the side of his head. They also shocked him with an electric prod on his neck, shoulders and back. This beating lasted all night.

Later interrogations followed the same violent pattern. In one, his captors beat his right leg repeatedly with a baton. His whole leg from the hip joint to the ankle became swollen and he was unable to walk without severe pain. Guards also shocked Lt. Col. Roberts on the neck, shoulders and back with the electrical device. The pain was intense and he could feel it throughout his body. It destroyed his will to resist. That night, while he was tied to a chair, an interrogator whispered to him, "You're a long, long way from Geneva

now." The interrogator also threatened to take him outside and feed him to the wolves if he did not cooperate.

Whenever the Iraqi soldiers transferred him to a new location, they slammed their rifle butts to his head, beat him, and kicked him. On January 21, 1991, his captors tried to force him to make a videotape denouncing the United Nations war effort and praising "peaceful Iraq." One guard slammed the bolt shut on his rifle and pointed it at his head. The Iraqi in charge of the taping session threatened that the guard would shoot him if he did not cooperate. A long period of beatings followed. He still refused to make the tape, and his captors ordered a guard to take him outside and cut off his hand and leg. As he was led through the doorway, his captors knocked him to the ground and began kicking all exposed areas of his body. The leader used a baton to beat the back of Lt. Col. Roberts's head and neck until he finally agreed to be videotaped.

Subsequently, Lt. Col. Roberts was moved to the Biltmore. Abusive interrogations continued there. His cell and his treatment were similar to what other POWs at the Biltmore endured. He was convinced that if he were subjected to this treatment for more than a few weeks, he would likely die.

After the bombing of the Biltmore, Lt. Col. Roberts was moved to another prison, where he developed severe intestinal problems from giardia because of the unsanitary conditions. In his six weeks as a POW in Iraq, he lost 35 pounds.

Appendix C

Lt. Col. Roberts's wife was eight months pregnant when he was captured and he feared for her well-being. He was never offered a real opportunity to notify his family of his status, but an Iraqi soldier once tried to exploit the status of the Red Crescent by wearing a Red Crescent patch on his arm and asking for Lt. Col. Roberts's family's name and address. The soldier got angry when Lt. Col. Roberts refused to give any address other than his unit's air base in Spain, and he left without taking any address at all.

For several years following his captivity, Lt. Col. Roberts noticed lingering effects of the torture to which he was subjected in Iraq. These effects included waking up in the middle of the night with bouts of anxiety. Knowing of the pain his family endured during his captivity has also magnified his own post-captivity suffering. During repatriation, he developed PTSD symptoms which persisted until 1995.

Lieutenant Colonel Russell Sanborn

On February 9, 1991, Iraqi soldiers shot down Lt. Col. Russell Sanborn's single-seat aircraft over southern Kuwait. He was quickly taken prisoner by a group of Iraqi soldiers, who shot at his feet to see his reaction and to celebrate their victory of capturing him. He feared for his life because one errant shot from an over-agitated soldier easily could have killed him.

Lt. Col. Sanborn was taken to an underground bunker with his eyes blindfolded and his hands tied behind his back. He was then loaded onto a truck. As the truck careened down

the road, he thought he was being taken to be killed in the desert. When the vehicle stopped, the guards grabbed him by his hair and arms and dragged him out of the truck. He was led into another underground bunker with a screaming crowd all around.

Inside the bunker, he was taken to what seemed to be a corridor with a large number of soldiers lining the walls on each side. He was pushed along this gauntlet of Iraqi troops, covered with a blanket so he could not see where the blows were coming from and with his hands tied so he could not protect himself. The soldiers beat him with a torrent of punches, kicks, and blows with hard objects that he assumed were rifle butts. The primary focus of the blows was his unprotected head. Each time one of the men knocked him to the floor, others kicked him viciously. Stunning blows were coming from every direction as he stumbled forward.

He finally reached the end of the hall where he was tossed into a room with five or six high-level uniformed military officers who threw him in the corner and removed the blanket from his head. He saw an apparently psychotic Iraqi soldier waiting to attack him. The soldier was being restrained, yelling and screaming. The Iraqi officers then released the man saying they were going to allow the man to tear Lt. Col. Sanborn apart. The man came at him in a flurry of arms and feet, punching and scratching. All he could do was curl up in a fetal position to protect his face and head. The man kicked him in the back of the head and in the kidneys while yelling and screaming. The Iraqi officers allowed the beating to continue for several minutes. Finally, the officers pulled the man away and sent Lt. Col. Sanborn back through the gauntlet of soldiers for more blows to his head.

Appendix C

Lt. Col. Sanborn was pushed into a truck and driven to another bunker. At the second bunker, he was again made to face a gauntlet of cheering soldiers with a blanket over his head and his hands tied behind his back. The soldiers screamed and cheered as they connected with their rifle butts to his head, shoulders, neck, and back. They were not asking for information; they were simply torturing him.

He was forced to face a third gauntlet at the next bunker. By the end of the third gauntlet, he had given up any thought of surviving and just wanted the Iraqi soldiers to end it quickly.

He was next driven to a location where he was left on a cement floor for twelve hours awaiting transportation to Baghdad. Along the way, they stopped at five or six locations where Iraqis, who he assumed were checkpoint guards, punched him, kicked him, and spit on him. During the ride, one of the soldiers repeatedly rubbed the inside of Lt. Col. Sanborn's leg, as if to threaten a sexual assault.

When he arrived in Baghdad, he was put into solitary confinement in a dark, unsanitary cell. His bedding was only a thin foam pad with one tattered blanket. A bucket in the corner served as the toilet. At night, the temperature would drop dramatically and he would shiver throughout the night. The food and water were contaminated and he had constant diarrhea and vomiting fits throughout the day. He developed a rash on his groin and contracted internal parasites. His repeated requests to see a doctor were ignored.

Appendix C

It was at this prison, two days after he was shot down, that his captors first gave him food or water. His daily diet became a ladle of greasy water with particles floating in it. One meal consisted of water with a backbone from some animal floating in it. On this starvation diet, he lost 14 pounds in 26 days as a POW. Each day, it became more difficult to get up and walk around the cell.

During the violent interrogations at this prison, Lt. Col. Sanborn was forced to sit on a stool, blindfolded and with his hands tied behind his back. The guards told him they controlled everything about him and they beat him savagely. Whenever he failed to respond adequately during questioning, the guards took what seemed to be blackjacks and struck him with full swings. They threatened his life constantly. He felt them press their pistols and rifles to his head and repeat that they held the power of life or death over him and he must cooperate. During his interrogations, the guards beat his legs and back with a rubber hose. The beatings from the rubber hose were excruciating and left discolored welts that lingered for days and weeks. They also hit the sides of his head so hard that they knocked him off his stool, loosened his teeth, and broke his eardrums. After his eardrums were ruptured, he could no longer hear or understand his torturers' questions so he was taken back to his cell.

During the time Lt. Col. Sanborn was in this prison, the guards demanded that he stand whenever they entered. When he did not, they kicked him until he struggled to his feet. As part of the psychological torture, he was told that he would be executed as a criminal when the war was over.

Appendix C

As he lay on the floor of his cell, he thought of what his family must have been suffering emotionally, thinking he was perhaps dead. His worry was exacerbated when the Iraqi guards demanded to know his specific address in the United States, which he refused to give. He was afraid they could eventually locate his wife and harm her, but he had no way to warn her of the potential danger.

When released from captivity, Lt. Col. Sanborn was taken to the hospital ship Mercy. He was diagnosed with an enzyme imbalance and parasitic anomalies and underwent numerous tests and treatments.

Today, his hearing has deteriorated substantially. It continues to worsen progressively as a result of the Iraqi interrogators bursting his eardrums in 1991. He now has trouble hearing normal conversational tones and has been informed by a doctor that he will probably need a hearing aid in the future.

He is currently experiencing posttraumatic symptoms, but they do not amount to a psychiatric disorder. He can usually put the past mistreatment by Iraq behind him if he does not dwell on the details. Indeed, writing his affidavit for this lawsuit was very difficult for him because it forced him to relive every blow, every kick, every threat, and the horror of every one of the twenty-six days he spent in Iraqi captivity.

Lt. Col. Sanborn continues to serve in the Marine Corps because he still wants to serve his country. In spite of having been a POW, he feels that he owes this duty to his family and to every American.

Appendix C

Commander Lawrence Randolph Slade

On January 22, 1991, Cmdr. Lawrence Slade's F-14 aircraft was hit by a surface-to-air missile and he ejected into Iraq. Following an effort at evasion, he was captured by a Bedouin tribesman and an Iraqi soldier armed with an AK-47 rifle. His captors pushed him to the ground with weapons pointed at him, blindfolded him, and bound his hands tightly behind his back. He was beaten, kicked, and forcibly thrown into a truck door, breaking his nose, breaking two teeth, and splitting both lips. He was taken to a bunker where he underwent violent interrogations. He remained blindfolded and handcuffed, losing feeling in his arms and hands. His interrogators beat him with wooden bats or blackjacks all over his body from the neck down. Above the neck, they hit him with their fists and hands, breaking his nose a second time, breaking several more teeth, and rupturing his eardrums. When he was able to see his body days later, it was completely blue and purple from the beatings.

Cmdr. Slade was taken back to the bunker on several occasions for interrogations by Iraqi Intelligence Service personnel and the production of two coerced videotapes. On one occasion, his captors stuffed paper down his flight suit and set it on fire while he was cuffed and blindfolded. On another occasion, they unzipped his flight suit to examine his genitals. Because he could understand some basic Arabic from growing up in Lebanon, he knew that they were trying to determine if he was Jewish.

He was later taken to the Biltmore in Baghdad. Custody of the Allied prisoners was transferred from the Iraqi Army

to the Iraqi Intelligence Service. Along with other prisoners, Cmdr. Slade was held here as a human shield in an attempt to prevent Allied bombing of this strategic target by coalition aircraft.

The conditions at the Biltmore were as forbidding as those previously described for the other POWs. He lost 45 pounds during his forty-three days of captivity on the starvation diet he was given, and he lost feeling in his hips because of the weight of his body pressing against the cold concrete when he slept. The numbness increased over time and eventually the feeling stopped returning during the day.

The interrogations at the Biltmore were conducted by officials in civilian dress rather than in Army uniforms. Physical violence continued during these interrogations. One of his interrogators asked Cmdr. Slade if he wanted to say anything to his wife, Anna, before he died. Then he pulled the trigger on an empty pistol. This mock execution was accompanied by about twenty blows to the head. The combination of the assault and the mock execution instilled more fear in him than he had felt before. This mock execution procedure was repeated on him three more times.

After being transferred to Joliet, the civilian prison, three guards entered Cmdr. Slade's cell and severely beat and kicked him and his British cellmate, Lt. John Nichol, for fifteen to thirty minutes. This attack broke his seventh vertebra.

Cmdr. Slade also suffered torn pectoral muscles from the beatings by his captors. Absent proper medical attention,

his broken vertebrae separated and improperly healed as two pieces. Twelve years later, he still cannot run or exercise for any length of time without experiencing pain between his shoulder blades from the injury. He continues to have abnormal liver functions, diagnosed as Gilbert's disease, which may have been caused or exacerbated by his starvation diet during captivity. He also has an undiagnosed condition in his upper intestines that causes bouts of incapacitating pain that may be caused by the scar tissue from repeated trauma to his abdominal region.

Following his release, he and his wife essentially began their marriage again. They deliberately postponed having children for several years following his release, to give them time to recover to some extent from the effects of his torture. Although he and Anna now have two daughters, the POW torture continues to touch their lives. His experiences as a POW and his need to encapsulate them so he could go on with his life have negatively affected his marriage. His wife remains terribly anxious during his overseas deployments. He has been changed by the experience of torture and it has caused friction in his marriage. His marriage is strong and loving now, but that is in spite of the terrible experience his Iraqi torturers put him through.

Cmdr. Slade developed Subthreshold Posttraumatic stress disorder which resolved spontaneously within approximately one year without treatment. However, his tortured POW experience diminished his subsequent performance evaluations and damaged his military career.

Appendix C

Major (Ret.) Joseph Small

Maj. Joseph Small's lightly-armed aircraft was hit by a surface-to-air missile over Kuwait on February 25, 1991. The missile killed his backseater on contact, but Maj. Small was able to eject safely. A dozen Iraqi infantrymen awaited his parachute landing and took him to an underground bunker.

At an Iraqi headquarters facility, he was forced to the floor in an awkward half-sitting, half-lying position that exacerbated the back and knee injuries he had sustained in his ejection. His wrists were swollen from the pressure of the tight constraints and he began to lose feeling in his hands. Several guards approached him from all sides and began hitting his head, especially targeting his ears. They whipped him with a strap and struck him on the back of his neck, knocking him unconscious. He was later taken outside to a latrine where he was asked whether he was Christian or Jewish and was examined to see if he was circumcised.

Guards drove Maj. Small to Basra and then to Baghdad, frequently beating him and threatening to kill him. The awkward seating position he was forced to assume tore a rotator cuff in his left shoulder. During an interrogation in Baghdad, he was threatened with execution. The cloth bindings on his wrists were replaced by handcuffs, which were ratcheted down as tightly as possible. Guards fondled his genitals, apparently again to check if he were circumcised. They caused him to fall down stairways twice.

Maj. Small was later taken to a prison just outside Baghdad. In this prison, he was given only a thin blanket

and very little food. Iraq held him as a human shield, and at no time during his approximately one week of captivity was the ICRC notified that he was being held as a POW, nor was he ever offered a chance to fill out a "capture card."

Upon returning to the United States, Maj. Small's readjustment with his family was not easy. He was jumpy and on edge. He knew that his wife and children had been through a very traumatic experience, and he had a difficult time dealing with that along with his own difficult experience. He began to build an emotional wall between himself and his family. He suffered from nightmares during his first months home, and he had many "flashbacks" while wide awake which were so real they frightened him. Maj. Small describes himself as a person with a "short fuse." Prior to his experience, he was an even-tempered, patient person. He now feels withdrawn, and in many respects depressed. Although he has great love for his family, he is unable to express it. He has become short-tempered with his wife and children. He feels alone and withdrawn even in a small group of friends or coworkers.

He continues to be uneasy around loud noises. A car's backfire or other sudden noise will startle him to the point of distress. He continues to have night sweats and to run fevers during stressful times. These changes in him are attributable to his torture, including the conditions of his confinement. He developed PTSD and still suffers from the disorder, resulting in moderate to severe impairment in his family life and social functioning.

Appendix C

Staff Sergeant (Ret.) Daniel Stamaris

While on a search-and-rescue mission on February 27, 1991, Staff Sergeant Daniel Stamaris's helicopter was shot down, killing five of the eight crew members. He was seriously injured, suffering a broken left foot, a double dislocated left foot, a broken left ankle, tibia, and fibula, a compound fracture and a shattered left femur, a torn posterior cruciate ligament in his knee, a broken and separated pelvis, several broken ribs, and bruised internal organs. Instead of giving him medical care for his injuries, Iraqi soldiers stripped him of his survival and first aid equipment and threw his dog tags into the sand. The soldiers told him he was going to die and then left him to do just that. Several hours later, members of the Republican Guard arrived at the crash site, put him on a tarp and tossed his body onto a truck. The excruciating pain caused him to scream.

During interrogations throughout the next few days, his captors threatened to castrate him if he did not answer their questions. He was never given medical care. Drivers moved him around like baggage, despite his extensive injuries. They also allowed civilians to beat him. He was repeatedly left outside to die, and he believed he might be killed by the wild dogs he could hear in the distance. Guards threatened to kill him and to cut off his leg. He lost approximately thirty pounds due to the malnutrition, lack of appropriate medical attention, and lingering injuries, which had been exacerbated by the abuse he endured. Meanwhile, Iraq let no one know of Staff Sergeant Stamaris's status as a POW and did not allow him to notify his family.

Appendix C

Although Staff Sergeant Stamaris's seven-day period in captivity was relatively brief, he could have died at any time while he was a POW because his femur was shattered and there were bone fragments within a millimeter or two of his main femoral artery. With the total disregard that the Iraqis showed toward his injuries, such as throwing him around and dumping him on the side of the road, these bone fragments could have shifted at any time and severed his main femoral artery, causing him to bleed quickly to death.

Six months after his release, Staff Sergeant Stamaris was able to work two hours per day while still convalescing. He had to undergo physical therapy for about a year. Continuing physical effects include decreased mobility and intermittent pain throughout his left leg, hip, and pelvis. Chronic lower back pain makes it difficult for him to sleep. His initially untreated left leg is now about 1 1/2 inches shorter than his right leg. He has endured multiple painful surgeries to address these problems with only limited success. He also believes that his earnings power has been depleted due to his restricted mobility.

As the result of the mistreatment he received in Iraq in the first 24 hours after his helicopter crashed, Staff Sergeant Stamaris developed Posttraumatic Stress Disorder which resulted in severe impairment in his personal life during the years 1991 to 1996. Symptoms of PTSD persisted in 1997 to 1998 leading to moderate impairment. He currently experiences occasional intrusive memories of his ordeal resulting in mild impairment.

Appendix C

Lieutenant Colonel Richard Dale Storr

On February 2, 1991, Lt. Col. Dale Storr's plane was hit by Iraqi ground fire and he was forced to eject. His wingman neither received his radio calls nor saw him eject. Additionally, because Lt. Col. Storr's parachute descent took him through the fireball caused by his exploding aircraft, his wingman failed to observe the parachute and feared that Lt. Col. Storr had been killed.

Lt. Col. Storr was immediately surrounded by Iraqi forces who slapped, beat, and kicked him. These beatings, occurring so soon after he ejected and parachuted through a fireball, were very disorienting and especially painful. As he was marched back to a truck, his captors hit him on the back of the head with a rifle butt, knocking him to the ground. They then threw him onto the truck bed.

During and between interrogations he was violently beaten, kicked in the head, urinated on, and sent tumbling downstairs. He was forced to walk though mobs of angry Iraqis who slapped, kicked, and punched him. His interrogators demanded strategic and personal information, and he was beaten for refusing to answer to their satisfaction. During certain interrogations, guards shocked him with an electrical device when he gave inadequate answers. They struck him so hard he fell off his stool. They beat him with clubs, broke his nose, dislocated his shoulder, and burst his left eardrum. While trying to rise from the floor, he vomited from the pain but they continued to torture him. Ultimately, the pain from his dislocated shoulder and broken nose, as well as the nausea, vomiting and diarrhea became nearly

unbearable, and he hoped he would die to end the agony. The guards continued to beat him, both during interrogations in an attempt to extract information, and between interrogations simply gratuitously. At one point, Lt. Col. Storr was blindfolded, handcuffed, and placed execution-style against a wall where he was videotaped by an Iraqi news crew.

Lt. Col. Storr was inspected to see if he was circumcised, apparently based on his captors' desire to determine whether he was an Israeli. He was also questioned in Hebrew to see if he understood and responded to that language.

At the Biltmore, the regional headquarters of the Iraqi Intelligence Service, Lt. Col. Storr was held in a small cell with a foul, non-functioning toilet. He was placed on a starvation diet of one ladle of greasy water per day, sometimes with a piece of bread. He was given only minimal drinking water. He lost 37 pounds while held for thirty-three days in Iraq and would likely have died if the war had lasted much longer. His cell was so cold at night that he would lose feeling in his feet and he had to rub them vigorously to get the blood to flow. He did not recover feeling in his feet until six months after his return to the United States, and some numbness continues today.

Iraqis continued to interrogate Lt. Col. Storr. They asked him to identify five methods they could use to protect their tanks from Allied missiles and told him they would cut off one finger for each method he failed to disclose. On another occasion, when the interrogators discovered that Lt. Col. Storr had been answering their questions untruthfully, guards beat

him severely and said they would execute him. Only the February 23 bombing of the Biltmore, where he was held as a human shield, disrupted these plans.[5]

Psychological violence continued for him as well. His captors regularly chained an Iraqi prisoner to the door next to his and beat the prisoner severely. His screams would go on for hours after these beatings with absolutely no sympathy from the guards. Lt. Col. Storr was told that the other American POWs were all being killed. Hearing a volley of small arms fire outside his window each morning led him to believe that executions were being carried out. Recognizing that it would be much more painful to Lt. Col. Storr than any physical torture, the Iraqi captors had previously told him falsely that his wingman had been shot down and killed trying to help him after the crash. He suffered greatly believing erroneously that his wingman, for whom he felt ultimately responsible, had died trying to save him.

After the destruction of the Biltmore, he was taken with other POWs to Joliet, the civilian prison. He became extremely sick with giardia due to the unsanitary conditions there. The guards did not let him use a bathroom to clean up the vomiting and diarrhea, and he was beaten for asking to use one. He was forced to use the corner of his cell as a toilet, and his requests for cleaning supplies were refused. Lt. Col. Storr has never forgotten the stench and squalor of being forced to live in his own excrement.

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5. The bombing of the Biltmore, while probably saving his life, almost cost Lt. Col. Storr his life. The ceiling and walls of his cell collapsed on him and only a large steel grate that fell over him prevented the larger pieces of rubble from crushing him.

Appendix C

Iraq never notified the ICRC or any other organization of Lt. Col. Storr's status as a POW. He agonized over the experience his family, particularly his mother, must have been going through. He learned from another POW that he was reported to have been killed and that his unit had held a memorial service for him.

To this day, he continues to have nightmares about his torture in Iraq. These nightmares occurred almost every day during the first few months after his release but have since faded to two or three times per month. Lt. Col. Storr thinks about his torture every day but is proud that he conducted himself honorably while in captivity and that his Iraqi captors failed to break him. Knowing the pain his family endured has magnified his own post-captivity suffering. His mother subsequently passed away, and he believes that her worry over his experience accelerated her illness. He expresses deep regret for putting his family and friends through anguish while he was a POW, apparently failing to recognize that it was not he but the Iraqi regime that hid his status as a POW and caused his family and friends to suffer.

Lt. Col. Storr developed several symptoms of PTSD which persist to the present, but his overall impairment is minimal. He is employed as a pilot by a major airline and continues to serve his country as an officer in the Washington Air National Guard.

Appendix C

Major Robert Sweet

On February 15, 1991, a surface-to-air missile struck Maj. Robert Sweet's plane, and he was forced to eject in Iraq. He parachuted down over approximately fifty Iraqi soldiers and a battle tank. Immediately upon his landing, soldiers descended on him, beating him with their fists, kicking him, and striking him with their rifle butts. The mob behavior caused him to believe that he could be killed.

During initial interrogations, he was threatened and spit upon. He was paraded around the city streets and forced to endure physical and verbal abuse. After being turned over to the Iraqi Intelligence Service, he was threatened with being stabbed in the stomach. His handcuffs were clamped so tightly that they cut off the circulation to his hands. He was pistol-whipped at the top of a staircase, causing him to fall down the flight of stairs into a basement area. He was beaten with a rubber hose on his legs and torso, causing extreme pain. He was placed in a chair and beaten again until he fell out of the chair. He was clubbed for what seemed like hours. The pounding on his left side was so intense that he was left entirely black and blue, and for a week he was unable to lie down except on his right side. He was interrogated at length and threatened repeatedly with death unless he provided useful information.

He was locked in solitary confinement in a dirty, eight-by-twelve foot cell, with no heat and often in total darkness. The toilet was broken and unsanitary. He had only a thin blanket to protect him from the freezing cold nights. For food, he was given a bowl of greasy, brownish-red broth, a piece

of pita bread, and a cup of water once a day. He lost 10% of his body weight on this forced starvation diet. The inadequate water ration during his nineteen days in captivity caused severe dehydration.

The cycle of torture and interrogation continued. In questioning him about his mission and other military information relevant to the coalition, the guards battered his head and body with their fists. A gun was placed against the side of his head and he was ordered to reveal who carried out a particular bombing mission. He thought he would be shot. On yet another occasion, he was faced with execution as a pistol was placed to his head and he was informed that he was to be shot. He was placed in front of a camera and told to give useful information or be killed.

In subsequent interrogations, he was battered by fists, kicked, and hit with gun butts and other instruments, as his interrogators demanded military information. During one of these torture sessions, a guard approached him from behind, cupped his hands, and hit his ears to burst his eardrums, leaving him with a tympanic membrane perforation. He could no longer hear out of his left ear for the duration of his captivity. At one point, he was accused of being a Central Intelligence Agency spy and told that he would not receive Geneva Convention protections. On another occasion, he was told that the President of the United States had been assassinated and that the First Lady had been injured.

While held in the Iraqi Intelligence Service headquarters, a lawful military target, he was exposed to coalition bombing. Later, he was moved to another prison, being hit again along

the way. On his first day at the new prison, he was forced to sit all day with his legs cramped under him. When he tried to move or reposition his legs, he was hit with a stick. This caused nerve damage to his feet.

The conditions at this second prison were vile, with the only source of water a dirty trash can. The food was contaminated or not cooked and gave him several intestinal diseases, including giardia and salmonella. This magnified the problems he was already experiencing from his grave loss of weight and strength. At the new prison, he was interrogated and his life was threatened.

Despite repeated requests to be allowed to notify the United States Government of his status so that his family would know that he was a POW, he was not allowed to do so. Instead, his captors used hints at family notification as an inducement for cooperation. Maj. Sweet was offered a call home to his family if he would betray his country, but he refused. He suffered from thinking about how his family, especially his mother, would be suffering from the uncertainty of his status.

After returning from captivity, he experienced only limited use of his left ear for months. He suffered from nightmares and anxiety directly attributable to his torture. Further, he has had repeated problems with his back and neck for more than a decade. Maj. Sweet is still experiencing posttraumatic symptoms caused by his experiences as a POW in Iraq.

Appendix C

Lieutenant Colonel (Ret.) Jeffrey Tice

On January 19, 1991, Lt. Col. Jeffrey Tice's F-16 aircraft was struck by a surface-to-air missile over Baghdad. He flew for nearly 100 miles toward safety in Saudi Arabia before he was forced to eject over Iraqi territory. Within thirty seconds of landing, he was surrounded by Bedouin tribesmen, kneed in the groin, and struck with a rifle butt in the back of his neck. That night he was taken to their camp where they took turns punching, kicking, or threatening him with knives. In addition, he was forced to hold a gun to his head and play Russian roulette. The next day, he was bound and taken to a nearby town to await interrogators.

Three men interrogated him, and he responded to their questions with name, rank, and serial number only. They handcuffed him behind his back, picked him up by his elbows, and dragged him to an unmarked car for the drive to Baghdad. Each time he moved, the handcuffs tightened and dug deeper into his skin.

In Baghdad, he was taken to a room inside a building on an Iraqi military compound and thrown to the floor. After a few minutes, he was shoved, still blindfolded, down several flights of stairs into an underground bunker. Initially, he was placed in a hallway in the bunker where passing Iraqis kicked him, slapped him, and spit on him. He was then transferred to an interrogation room and chained to a chair. Over the next two or three days, he was interrogated around the clock in sessions lasting approximately thirty minutes, interspersed with thirty-minute breaks. Because of his rank, his interrogators pressed him for significant strategic information.

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His interrogators beat him, generally in the lower extremities, focusing on his left leg and knee, and struck him all over his body with whatever objects they had at hand. At one point, he was struck with a wooden plank that shattered and almost broke his lower left leg. In addition to the pain from the beatings, he had completely lost circulation in his hands after approximately twelve to fourteen hours of being tightly handcuffed. Lt. Col. Tice was beaten almost to the point of unconsciousness several times during these interrogation sessions. After the first day of torture, he was already badly bruised.

Voicing suspicions that he might be Israeli, his captors stripped him naked below the waist to check for circumcision. His penis was fondled and he was verbally abused during this inspection. His interrogators then accused him of being an Israeli spy.

As he continued to resist his captors' requests for information, the beatings became particularly fierce. He soon realized that his interrogators were beating him primarily on his lower body because they wanted him to make a videotape denouncing the United Nations' "invasion" of Iraq. He flatly refused and the interrogators became still more violent. Someone hit him, full force, with a semi-soft object in the left side of his head. This blow ruptured his eardrum, and he immediately felt blood running down his face. The interrogator began yelling that they could kill him and "feed his body to the dogs" and no one would know. He continued to refuse to make the video and they beat him again. One of the guards put a pistol to his head and pulled the slide back as the interrogator told Lt. Col. Tice that he would make the

videotape or be shot. He refused. This enraged the guard, who hit him with the butt of his pistol on the side of his head, dislocating his jaw. The Iraqi captors dragged Lt. Col. Tice into the hallway where he put his face against the wall and forced his jaw back into a less painful position. After this brief respite, his captors dragged him back into the torture cell and chained him to the chair. His interrogators continued to press for the videotape. When he continued to refuse, one of them hit him and again dislocated his jaw.

At that point, one of the Iraqi guards tied a wire from Lt. Col. Tice's right ear, under his chin, to his left ear, to a battery, and turned on the electricity. The resulting shock forced every muscle in his body violently to contract at once. This caused his jaw to seize, his face to contort, and it forced his head to his chest and his knees to his head. Lt. Col. Tice called this torture device the "Talkman." As they repeatedly applied the shock treatment, it slammed his jaws together with enough force to crack his teeth. He was electrocuted perhaps ten or twelve times over the next twenty or thirty minutes.

He continued to refuse to participate in the video and a handgun was put to his head. The guard then struck him with the flat of the gun. Then the "Talkman" was hooked up and activated again. Eventually, he agreed to make the video to send a message to his wife and children, but he viewed this as the lowest point physically and psychologically of his captivity.

Because his jaw was still dislocated and several of his teeth were broken, he had great difficulty eating the meager rations he was given each day. He could not hear well because

both of his eardrums were damaged. While in Iraq, he never received any medical attention. Instead, he was violently interrogated every night and given regular "maintenance" beatings that focused on his existing injuries.

Lt. Col. Tice was later moved to the Biltmore. He was kept in solitary confinement in a small cell with almost no light and a non-functioning toilet. He was given only two thin blankets to use in his cell that was always cold because it was covered in ceramic tiles on all sides. He was always cold and spent most of the time in his cell trying to keep warm.

When given food, it was always in very small amounts. His daily ration consisted of a few ounces of red liquid, which he believed was the water the guards' meat had been boiled in. At one point, he went without water for three days. The limited water he received often smelled like diesel fuel.

Lt. Col. Tice was interrogated approximately ten times during his three-week incarceration at the Biltmore. The interrogators focused on obtaining information that would help them stop the coalition air campaign. During these interrogation sessions, he was told that he would never be allowed to go home and his interrogator hinted that he would be tried as a war criminal.

On another occasion, he was removed from the Biltmore, crudely shaven with a dull razor, then taken to a basement level television studio and put on the stage of what looked like an Iraqi talk show. When he refused to voice the statements they wanted, he was removed from the stage,

thrown to the ground, kicked in the groin, punched, and hit in the head, shoulders, and ankles with a club and rifle butts. He continued to refuse and was thrown back into his cell when they realized he was no longer presentable for the camera.

After the destruction of the Biltmore in the bombing raid by Allied forces, Lt. Col. Tice was transferred to Joliet. During the drive to the new prison, a guard struck him between the shoulder blades with the butt of his rifle, partially dislocating his right shoulder and knocking him to the ground.

At Joliet, he was forced to kneel in the courtyard, blindfolded and handcuffed. He was afraid he might be summarily executed. He was forced to stay in the kneeling position for three or four hours. Each time he tried to move, a guard struck him across the shoulders with a baton.

He was then thrown into an eight-by-ten cell with a British airman. There was no toilet in their cell, and they were allowed out only once per day to relieve themselves. They were also fed only once per day. The food consisted mainly of broth and small amounts of leafy vegetables. His dehydrated state forced him to ingest any available water. Because most of the water he was given here was contaminated, he was quickly afflicted with intestinal parasites. The resulting dysentery caused him great distress and pain.

Although Lt. Col. Tice was in captivity for over six weeks, Iraq never released his name as a POW, even after Iraq was forced to account for the POWs as part of the

ceasefire. Even after the first group of POWs was released on March 5, Lt. Col. Tice's family suffered great mental stress because they still had no idea what had happened to him. Knowing of the pain the Iraqi regime caused his family to endure has added to Lt. Col. Tice's own post-captivity distress.

Upon his release, Lt. Col. Tice was flown to Bahrain and examined and treated aboard the USNS Mercy for diarrhea, possible spinal injury, jaw dislocation, rib contusion, malnutrition, perforated left tympanic membrane, compression injures to his hands, and dental trauma. After he returned to the United States, he was admitted to Malcolm Grow Medical Center at Andrews Air Force Base for further treatment for his injuries.

He continued to have nightmares for months following his release. His nightmares were replays of his electric shock torture. Additionally, he was sensitive to loud noises. His body stored as fat almost any food he ate, and it took him nearly two years to regain his normal body mass and fat/ muscle ratio.

To this day, Lt. Col. Tice suffers from lasting nerve damage to his hands from the handcuffs being clamped so tightly on his wrists. He also has muscle and nerve damage below his left shoulder blade which is related to the beatings he received. He suffers from temporal mandibular joint syndrome, a condition related to the multiple dislocations of his jaw.

Appendix C

Lt. Col. Tice experienced several symptoms of PTSD early in his repatriation as the result of his captivity and the treatment he received in Iraq, including nightmares and flashbacks, hyper-arousal responses such as increased startle, and poor sleep. Currently, he is functioning well with occasional nightmares and flashbacks related to the torture he received.

Lieutenant (Ret.) Robert Wetzel

Lt. Robert Wetzel was seriously injured when his aircraft was shot down in southwest Iraq on January 17, 1991, the first day of the Gulf War. Because of his knowledge of the torture practiced by Iraq, he contemplated shooting himself to keep from falling into the hands of Saddam Hussein. He realized, though, that his navigator might also be alive and need help. He called out for Lt. Zaun and, after they located each other, they began to walk toward Jordan until they were captured by Iraqi soldiers.

After he was captured, Lt. Wetzel received no treatment for his broken collarbone, broken vertebrae, and broken left arm. Surgery performed on his broken right arm was so inadequate that he had to keep his arm immobile during his captivity because he felt a grinding sensation in his shoulder with any movement. During this period of "medical treatment," he was interrogated in front of a video camera and was taken to a TV studio, dressed in a military flight suit and questioned in front of the cameras, apparently for propaganda tapes.

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Later, he was taken to the Iraqi Intelligence Service Regional Headquarters where he was kept in solitary confinement. He was fed only once per day on a starvation diet of soup and bread that caused him to lose 25 pounds during his approximately forty-six days of captivity. He endured freezing temperatures night after night. He was kept in a cell that had no functioning toilet, had no bed or furniture, and had a cockroach infestation. At night, an Iraqi radio station was played over loud speakers to disrupt the sleep of the POWs and further disorient them. His cell was infested with lice, causing him to scratch his entire body uncontrollably. The contaminated water he drank gave him giardia, which caused diarrhea and further exacerbated the anemic symptoms he was suffering because of his starvation. On many occasions, he heard the guards pull other prisoners out of their cells at night and beat them severely.

During interrogations, he was blindfolded and whipped with a leather whip. Preying on the injuries he suffered when his aircraft was shot down, his captors whipped him principally over his broken arms, shoulders, back, and legs. His arms and hands were so numb from the whipping that he did not even feel the burn of a lighted cigarette a guard placed against his skin. The side of his head was also whipped with what he believed to be some kind of beaded instrument. In another interrogation, the four or five men in the room took turns hitting him on the side of his face. They threatened to break his left arm if he did not answer their questions, not knowing that it was already broken. On another occasion, he was taken to the interrogation room and inspected to determine if he was circumcised, apparently to see if he was Jewish.

Appendix C

When the Intelligence Service Regional Headquarters was bombed on the night of February 23, he was subjected to the terrifying bombing and was left in his cell overnight, as the Iraqi captors fled in fear of another attack.

Lt. Wetzel lived in fear of the Iraqi torture and in constant misery from his injuries and the inhumane conditions of his captivity. He was never permitted to write to his family or to notify anyone of his captivity and condition. During his captivity, he anguished over his parents and siblings and his fiancée, Jacqui. Their wedding, planned for March 2, was postponed until after his release and after he had an opportunity to recover from the immediate effects of his torture.

After his eventual release, Lt. Wetzel spent thirty days in the Bethesda Medical Center receiving treatment for his severe injuries. The absence of proper medical treatment during his captivity, coupled with his starvation diet and other brutal conditions, resulted in only minimal healing of any of his broken bones. Because his right arm and shoulder had been immobilized so long during captivity, his muscles atrophied and his ligaments and tendons tightened. This significantly reduced his range of motion. When he moves his arm, his entire shoulder moves in an unnatural way. This is a constant source of pain when he uses his shoulder. His left arm also becomes sore whenever he uses it. He fears that the pain he suffers will get worse with age. As the result of his Iraqi captivity and torture, Lt. Wetzel developed mild PTSD symptoms, including increased irritability and loss of patience at home.

Appendix C

Commander (USNR) Jeffrey Zaun

On the first day of the war, then-Lt. Zaun and Lt. Wetzel were shot down in western Iraq. Upon his capture, he was roughly forced into the back seat of a truck, blindfolded and handcuffed, and driven to Baghdad. At one point during the trip, he was led to believe that someone would cut his throat.

As his first interrogation began, his blindfold was secured so tightly that his eyes throbbed. His captors then cuffed his hands behind his back without engaging the holding mechanism, making the handcuffs tighten with each movement. This caused a painful loss of circulation in his hands, which remained numb for the next two weeks. During subsequent interrogations, the interrogators asked him tactical questions about his mission and the location of Allied forces. When he refused to provide the requested information, one of the men repeatedly karate chopped Cmdr. Zaun in the throat and struck him across the face.

At one point during an early interrogation, his flight suit was unzipped to inspect his genitals to determine whether he had been circumcised. He believed his interrogators were checking to see if he was Jewish.

He remained handcuffed and blindfolded and was left to lie in a bunker hallway for several days. Periodically, he would be taken to a room for interrogation. During one of his interrogation sessions, his tormentors brandished a pistol, accused him of crimes against the Iraqi people, and said they were going to kill him unless he made a videotape denouncing the coalition effort. Although he was tormented by being

forced to make a video, he believed that making the video was the only way he might survive. He also thought that the tape might give notice to his family that he was being held as a POW. His shame and embarrassment about having made this coerced tape has been central to much agony and friction in relationships even with his loved ones who are unable to understand his feelings.

On January 31, 1991, Cmdr. Zaun was taken to the Biltmore in Baghdad where he was thrown into a tiny cell. He could not see the walls of his cell because it was so dark, and the sensory deprivation of weeks in this cell was excruciating. He was given small blankets to shield him from the extreme cold, but he still shivered every moment he was in this location.

He finally received food on the third day and was thereafter fed once each day with a cup of broth and two pieces of pita bread. His systematic starvation while in Iraq produced a weight loss of 30 pounds during his forty- six days of captivity.

During his captivity at the Biltmore, his captors sought to compel information about flight strategy and capabilities, and he was often hit in the face when he gave unsatisfactory answers. He was also subjected to two mock executions and several death threats which put him in great distress, as did hearing a nearby Iraqi prisoner being beaten. The guards at the Biltmore taunted him by stating that his mother must be very upset at his condition as a POW. This was terrible psychological torture for him.

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When the Biltmore was bombed by coalition aircraft, he was able to escape from the cell and he tried to free his fellow POWs. When he was recaptured by the guards, they hit him in the face until he lost consciousness.

When Cmdr. Zaun was later transported to another prison, the guards again used handcuffs without the locking mechanism engaged, causing numb thumbs for weeks because of the loss of circulation and nerve compression. Additionally, one of the guards on this trip made a gesture suggesting that Cmdr. Zaun was going to be raped.

Cmdr. Zaun developed intestinal problems, which resulted in vomiting and diarrhea. There was no drain or toilet in his cell, and extremely unsanitary conditions persisted.

On his release from captivity, Cmdr. Zaun was diagnosed with stomach worms and told that he had a fractured shoulder. He had lingering fears for several months after his return. He was diagnosed with insomnia. He remains deeply affected by having been forced to make the videotaped statement that was broadcast internationally.

Cmdr. Zaun is aware that his parents suffered a great deal during his captivity, and he believes that the experience of torture has affected his relationship with his father. He also believes that the media attention that resulted from the forced video affected his career status in the military. As a result, he left active duty in 1998. He is now a Commander in the United States Navy Reserve.

Appendix C

As a result of the treatment that he received during his captivity in Iraq, he developed symptoms of PTSD including intrusive thoughts about death, anxiety, and difficulty sleeping. His symptoms persisted for several months after repatriation but then subsided. He is no longer symptomatic.

B. *Family Member Plaintiffs*

The family member plaintiffs in this case suffered extreme emotional distress during the period of their loved ones' captivity. They all worried about the safety of their loved ones and reasonably feared that their loved ones would be subjected to brutal torture. This fear was based on the family members' knowledge of Saddam Hussein's reputation for barbarous treatment of prisoners in prior conflicts, reports out of Baghdad that POWs were being beaten and killed, and the televised images of obviously beaten POWs. Iraq's noncompliance with internationally-accepted standards for the treatment of POWs extended to its threats to use the POWs as human shields, an intent broadcast on Radio Baghdad and well known to the family members of the POWs. Iraq's persistent refusal to release information on the status of the POWs to the ICRC had a direct impact on the POWs' families.

The family members' suffering did not end with the release of the POWs. Each had to endure the pain of seeing the altered condition of loved ones upon release. The POWs had not only suffered great physical abuse but also great psychological abuse, and many returned as different men, forever changed by their treatment by Iraq. Some changes caused by starvation diets and beatings were immediately

apparent. Changes in the POWs' personalities soon became apparent. Many of these physical and psychological effects continued beyond the short term.

The lingering effects continue to plague both the POWs and their family members. While the family member plaintiffs remain close to their loved ones who suffered so deeply at the hands of Saddam Hussein and his regime, they have been gravely affected by the torture endured by the POWs. Many have movingly testified about how, after twelve long years, they are still waiting for their "real" husband, father, son, or brother to return. Their testimony is supported by evidence submitted by plaintiffs' medical experts.

Spouses

The suffering of the POWs' spouses was especially great. During the period of captivity, they did not know from one minute to the next whether their husbands were alive or dead. They were acutely aware that their husbands were probably being tortured. They were torn by the desire to take some action to try to help and the fear that anything they said or did could be used by Iraq to torment their husbands. Iraq's withholding information about the conditions of their husbands weighed heavily on them.

Moreover, the spouses suffered perhaps the greatest anguish over the altered conditions of their husbands upon their eventual release. Without minimizing in any way the intense suffering endured by the POWs' wives during their husbands' captivity, the suffering the wives have endured following repatriation is both overwhelming and long-lasting.

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Many have testified eloquently about the fact that their husbands were not the same men as the ones they had married, but the spouses have continued to love the husbands who returned to them following their release from captivity. Indeed, as poignantly stated by one spouse: "How can we not love any of [the POWs] that actually did daily mental and physical combat in a way that none of us will ever realize?" Leigh Berryman Aff. ¶ 12.

All of the spouses have had to live with their husbands' ongoing physical and psychological problems. In the words of one spouse: "One of the sad lessons I've learned is that time does not heal all wounds" and "[e]ven today, not a day goes by where I do not feel the burden of his experience." Cynthia Acree Aff. ¶ ¶ 51, 57. The testimony of the other spouses is similar in tone and substance. All suffered, and continue to suffer, greatly as a result of their husbands' ordeal. Some or all suffer from secondary trauma, depression, anxiety, and hopelessness resulting in severe disruption in marital and interpersonal functioning.

Children

The children, too, were dramatically affected. They endured immense fear and pain during the period of their fathers' captivity. In addition to coping with the trauma of knowing that their fathers were probably being abused, many had to cope with taking on a more adult role or having less adult supervision because of the stress their mothers were experiencing.

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Upon their fathers' return from captivity, many of the POWs' children discovered that the nature of the parent-child relationship was altered. Some children suffered the loss of emotional closeness, the loss of parental companionship and affection, and the increased fear and tension which resulted from the changes in their fathers' personality. For many, the problems persisted well beyond the short term, with some never successfully being resolved. Indeed, one POW's son suffers from increased depression, anxiety, PTSD, and other psychological problems, leaving him unable to work and earn a living.

Parents and Siblings

The parents and siblings also went through extremely difficult times. All were acutely aware of the likelihood of torture. Many of the parents aged dramatically during the period of their sons' captivity and have never fully recovered from the strain of this ordeal. Returning POWs wanted to protect their parents from the gruesome details of captivity, but their parents sometimes were hurt that their POW sons could discuss those details with others but not with them. Some relationships have been forever changed.

All of the siblings in this case enjoy a very close bond with their brothers who were held and tortured as POWs. As a result, all suffered greatly while their brothers were in captivity, not knowing their conditions and strongly believing that they were being tortured. Moreover, the effects on the siblings have continued, and many of the siblings remain dramatically affected to this day. Lt. Col. Storr's brother David remains haunted by his feelings of helplessness as a

"Marine officer who had trained for ten years" but found himself "powerless" to help his brother. David Storr Aff. ¶ 20. Another sibling describes seeing, immediately upon her brother's return, that "the spark that was always so evident in him was gone" and that it was replaced by "the thousand yard stare." Patricia Borden Aff. ¶ 14. The other siblings experienced similar concerns and emotions.

III. DEFENDANTS

The defendants in this case are Saddam Hussein in his official capacity as President of the Republic of Iraq, the Iraqi Intelligence Service, and the Republic of Iraq.[6]

A. *Saddam Hussein*

During these events, Saddam Hussein was the President of a single-party totalitarian state, and simultaneously the Head of State, Chair of the Governing Council, Chairman of the Party, the exclusive appointing authority for all government offices, the director of the budget, the Commander-in-Chief of the Military, and at least the de facto head of the Intelligence Service and all other agencies and instrumentalities of Iraq. *See Hill v. Republic of Iraq, 175 F.Supp.2d 36, 48 (D.D.C.2001).* Saddam Hussein, acting within the scope of his official capacities, is responsible for the torture of the POWs.

In his official capacity, Hussein had direct command responsibility for torture. All of the government agencies and

6. Because of recent military action in Iraq, the current status of Saddam Hussein and the Iraqi Intelligence Service is uncertain.

assets of Iraq were ultimately subject to Saddam Hussein's direction and control. According to Ambassador Nathaniel Howell, a former State Department Country Director for Iraq and the United States Ambassador to the State of Kuwait during the Gulf War: "Saddam Hussein and the State of Iraq are essentially synonymous. He is in total control of all aspects of Iraqi government and life . . . ." Howell Aff. ¶ 9. Further, "Hussein and his officials employ torture, execution, and other forms of coercion at an institutional level against his enemies, real or suspected. The targets are not only those who are perceived to have offended the regime, but also their families." *Id.* ¶ 18.

An official United States report on Iraqi War Crimes transmitted to the President of the United Nations Security Council concludes that "the mistreatment of U.S. prisoners of war occurred with at least the acquiescence, and probably at the direction, of the Iraqi leadership." *See* Report on Iraqi War Crimes (Desert Shield/Desert Storm), 48th Sess., at 11, U.N. SCOR, U.N. Doc. S/25441 (Mar. 19, 1993).[7] The report concludes that "[r]esponsibility for the treatment of . . . prisoners of war in Iraqi hands clearly lay with the Government of Iraq and its senior officials," and that "the charged violations of the [Geneva Convention] were committed as a result of [Saddam Hussein's] orders, were

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7. The Report, which was transmitted by the Deputy Permanent Representative of the United States, contains conclusions based on extensive evidence accumulated by a Judge Advocate General ("JAG") unit deployed to Iraq. The evidence, obtained through both interviews and documentation, was collected and analyzed by a second JAG unit in the War Crimes Documentation Center in the United States.

carried out with his knowledge and approval, or were acts of which he should have had knowledge." *Id.* at 18, 37-38. "The investigation concludes that Iraqi violations of the law of war were widespread and conducted pursuant to the orders or with the approval of the national leadership of Iraq." *Id.* at 6. As Col. David Graham, a special assistant to the Judge Advocate General and an expert in the law of war, testified:

> States cannot absolve themselves of liability by claiming that torture occurred under the control of units such as their armed forces or intelligence services. . . . Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them. Under international law not even a change of government absolves a state of responsibility for its "grave breaches." The High Contracting Parties to the 1949 Geneva conventions are states, not governments of states. Any other rule would seriously undermine these important obligations by permitting a simple change of government to remove all liability and deterrent effect.

Graham Aff. ¶ 10.

B. *The Iraqi Intelligence Service*

The Iraqi Intelligence Service and its officials were officials, employees and agents of the Republic of Iraq who participated in and provided material support and resources for the torture and mistreatment of American POWs and their

families. The POWs were held at the Iraqi Intelligence Service regional headquarters, which was apparently intended to be the POWs' main long-term incarceration site. *See* Appendix O, *The Role of the Law of War* (1992), *in* U.S. Department of Defense Report to Congress on the Conduct of the Persian Gulf War (Apr. 10, 1992), *reprinted in 31 I.L.M. 615, 630 (1992)*. Many of the POWs in this case were brutally tortured while held at this facility. "[T]he POWs' treatment while in the hands of Iraqi intelligence . . . personnel was barbarous, cruel, and in clear violation of the [the 1949 Geneva Convention Relative to the Treatment of Prisoners of War]." *See* Report on Iraqi War Crimes (Desert Shield/Desert Storm), *supra*, at 35-36.

Ambassador Howell noted with respect to the Iraqi Intelligence Service that "[t]orture is a recurrent pattern of the way Saddam Hussein governs, and the Iraqi Intelligence Service operates under his direction to carry out these activities." Howell Aff. ¶ 14. He confirmed that "Saddam Hussein provides the Iraqi Intelligence Service with substantial resources and support because it is central to his personal security." *Id.* ¶ 17. Patrick Lang, the Defense Intelligence Officer for the Middle East, South Asia, and Counterterrorism in the Defense Intelligence Agency from 1985 until 1992, provided expert testimony that showed that "the POWs who are the plaintiffs in this suit were held and systematically abused in violation of the law of war by the official Iraqi government agencies known as the Iraqi Intelligence Service and the Military Intelligence/Military Security Service and that this abuse could only have occurred through the agency of Saddam Hussein himself acting as president of Iraq." Lang Aff. ¶ 15.

Appendix C

C. *The Republic of Iraq*

The Republic of Iraq is a "foreign state" as defined by *28 U.S.C. § 1603* of the FSIA. Its torture of, and responsibility for the resulting personal injury to, the American POWs and their families fall squarely within the *§ 1605(a)(7)* exception to the FSIA. Its officials, employees and agents carried out the torture of American POWs in this case, and provided material support for it, while acting within the scope of their office, employment or agency, and with the resulting personal injury to the plaintiff POWs and their family members. Irrespective of individual and institutional responsibilities that also exist, the Republic of Iraq is responsible for the torture of, and personal injury to, plaintiffs.

CONCLUSIONS OF LAW

I. JURISDICTION UNDER THE FSIA

The FSIA's enumerated exceptions to sovereign immunity are the basis for subject matter jurisdiction over foreign states and their agencies and instrumentalities. *Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989).* The Court has jurisdiction pursuant to the exception set forth in *28 U.S.C. § 1605(a)(7)* over suits against states designated by the Department of State as terrorist states with respect to certain acts in which either the claimant or the victim were nationals of the United States.

Appendix C

The first statutory element for subject matter jurisdiction pursuant to *§ 1605(a)(7)*, as amended,[8] is that "money damages are sought against a foreign state for personal injury . . . caused by an act of torture . . . or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." This case is such an action for personal injury caused by the torture and the provision of material support and resources for such torture by officials and employees of Iraq while acting within the scope of their office or employment. For purposes of *§ 1605(a)(7)* actions, "torture" is defined in *§ 1605(e)(1)* of the FSIA by reference to § 3 of the Torture Victim Protection Act of 1991. That section defines torture to include:

> any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . , whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

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8. The 1996 amendment, known as the Flatow Amendment, was enacted as part of the Antiterrorism and Effective Death Penalty Act. *28 U.S.C. § 1605(e)(7)* Note.

28 U.S.C. § 1350 note. The treatment of the POW plaintiffs by their Iraqi captors falls squarely within this definition of torture.

The second element under *§ 1605(a)(7)* is that the foreign state was designated as a state sponsor of terrorism at the time the act occurred. The Republic of Iraq was designated by the Department of State as a state sponsor of terrorism in September 1990, prior to defendants' torture and mistreatment of the American POWs and their families. *See 15 C.F.R. § 746.3(b); Daliberti v. Republic of Iraq, 97 F.Supp.2d 38, 44 (D.D.C.2000).*

The third requirement for subject matter jurisdiction is that, if the act occurred in the foreign state against which the claim has been brought, then the claimant must afford the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration. The plaintiffs in this case repeatedly offered the defendants an opportunity to arbitrate their claims in accordance with accepted international rules of arbitration, yet the defendants did not accept plaintiff's offers.

The final element for jurisdiction under *§ 1605(a)(7)* is that either the claimant or the victim must be a national of the United States. Plaintiffs in this case are all nationals of the United States.

Because this case was filed pursuant to the Flatow Amendment, there is a further requirement that United States officials, employees or agents would be liable for such acts if carried out within the United States. *See Elahi v. Islamic*

Republic of Iran, 124 F.Supp.2d 97, 107 (D.D.C.2000). American officials, employees or agents would be liable for similar acts of torture if carried out in the United States. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); Elahi, 124 F.Supp.2d at 108 n. 14.*

All of the requirements contained in *§ 1605(a)(7)* are satisfied in this case and the Court, therefore, has subject matter jurisdiction. Because the Court has subject matter jurisdiction, the service of process achieved here pursuant to *§ 1608* of the FSIA provides personal jurisdiction over the defendants in this case. *28 U.S.C. § 1330(b); Daliberti v. Republic of Iraq, 97 F.Supp.2d at 53.*

II. LIABILITY

Section 1605(a)(7), as amended, creates a federal cause of action against officials, employees and agents of a foreign state, as well as the state and its agencies and instrumentalities themselves. *See Cronin v. Islamic Republic of Iran, 238 F.Supp.2d 222, 230-31 (D.D.C.2002); Weinstein v. Islamic Republic of Iran, 184 F.Supp.2d 13, 24 (D.D.C.2002); Eisenfeld v. Islamic Republic of Iran, 172 F.Supp.2d 1, 7 (D.D.C.2000); Daliberti, 97 F.Supp.2d at 43; Anderson v. Islamic Republic of Iran, 90 F.Supp.2d 107, 113 (D.D.C.2000).* Suits brought under *§ 1605(a)(7)* may be based on conventional common law torts such as assault, battery, and intentional infliction of emotional distress. *See, e.g., Stethem v. Islamic Republic of Iran, 201 F.Supp.2d 78, 87 (D.D.C.2002); Hill v. Republic of Iraq, 175 F.Supp.2d 36, 45-46 (D.D.C.2001); Jenco v. Islamic Republic of Iran, 154*

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F.Supp.2d 27, 33-37 (D.D.C.2001), aff'd, 315 F.3d 325 (D.C.Cir.2003); Sutherland v. Islamic Republic of Iran, 151 F.Supp.2d 27, 47-50 (D.D.C.2001); Anderson, 90 F.Supp.2d at 113.

The torture of the plaintiff POWs, and the resulting personal injury to them and their family members, constitute the traditional torts of assault, battery and intentional infliction of emotional distress. "An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension." *See Restatement (Second) of Torts § 21(1).* The torture of American POWs in this case involved numerous acts by officials, employees or agents of the Republic of Iraq acting within the scope of their office or employment and intending, viciously, to cause either a harmful or offensive contact with a person or an imminent apprehension of such a contact. This satisfies the elements of a cause of action for assault.

The torture of the plaintiff POWs also constitutes the tort of battery. "An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." *See Restatement (Second) of Torts § 13.* The officials, employees and agents of the Republic of Iraq acting within the scope of their office brutally, repeatedly and intentionally caused harmful and offensive contact to the POWs.

Appendix C

Defendants are also liable to the POW plaintiffs for the tort of intentional infliction of emotional distress. The elements of a claim for the intentional infliction of emotional distress are (1) conduct by the defendant that is extreme and outrageous; (2) conduct by the defendant that was intentional or reckless, and (3) severe emotional distress suffered by the plaintiff as a result of defendant's conduct. *See Restatement (Second) of Torts § 46.* The defendants engaged in outrageous conduct designed to cause severe emotional distress to the POWs. The Iraqi captors' extreme and outrageous conduct succeeded in causing severe emotional distress for the POWs. The POWs constantly feared torture and death as a direct result of the severe physical and mental abuse imposed by the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein. The outrageous physical and mental torture by Iraq, the denial of requests to notify family members, the forced propaganda tapes by injured POWs, the refusal to permit the ICRC to inspect the prisoners' conditions, and Iraq's public announcement that POWs would be used as human shields intentionally caused severe and enduring emotional distress for the POWs. *See Jenco, 154 F.Supp.2d at 33-37; Sutherland, 151 F.Supp.2d at 47-50.*

The plaintiff family members are entitled in their own right to recover for the intentional infliction of emotional distress inflicted on them by defendants, wholly apart from recovering solatium damages for their emotional distress due to the torture of their POW family members. *See, e.g., Jenco, 154 F.Supp.2d at 35-36.* Defendants intentionally refused to comply with their legal obligation under the Geneva Convention to permit a POW to write to his family to inform

them of his capture and his state of health. This provision of the Geneva Convention is intended to protect family members as well as POWs. The defendants' actions in this regard were outrageous, were intended to cause emotional distress to the plaintiff family members, were in callous disregard of the risk that such emotional distress would result, and actually caused severe emotional distress to the family members. As a result, the family members have satisfied the necessary elements of a cause of action for the intentional infliction of emotional distress under *§ 46(1) of the Restatement (Second) of Torts*.

Many family member plaintiffs also make out a case of intentional infliction of emotional distress under *§ 46(2)* of the Restatement. It provides that where the outrageous conduct "is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress . . . to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm." *Restatement (Second) of Torts, § 46(2)(a); see also Jenco, 154 F.Supp.2d at 35-36.* When the defendants tortured the POW plaintiffs, they intended to and did cause emotional distress to the POWs' immediate family members. *See Sutherland, 151 F.Supp.2d at 50.* The defendants caused images of battered POWs to be broadcast on television. They made public threats to use the POWs as human shields. These actions generated public reporting and knowledge concerning the defendants' past and ongoing participation in brutal torture. This made immediate family members contemporaneously aware that their loved ones were probably being tortured. Thus, these family member plaintiffs were "present" within the meaning of

§ 46(2) since "family . . . present at the time" is "distinguished from [family] who discover later what has occurred." *Restatement (Second) of Torts § 46* cmt. 1.

In summary, defendants are liable to plaintiffs under *§ 1605(a)(7)* of the FSIA, as amended, for the personal injuries they intentionally caused when they assaulted and battered the plaintiff POWs and when they intentionally inflicted emotional distress on the POWs and their family members.

III. COMPENSATORY DAMAGES

A. *Elements*

Section 1606 of the FSIA provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages . . . ." *28 U.S.C. § 1606. Section 1605* provides for an award of "money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in *section 1605(a)(7)*." *28 U.S.C. § 1605* Note.

Calculation of damage awards under the FSIA is governed by the American rule on damages. *Hill v. Republic of Iraq, 328 F.3d 680, 684 (D.C.Cir.2003)*. That rule as set forth by the Supreme Court is:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of

> damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of damages as a matter of just and reasonable inference, although the result be only approximate.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931). A plaintiff must "prove the fact of injury with reasonable certainty, [and prove] the amount of damages . . . based on a reasonable estimate." *Hill, 328 F.3d at 684* (quoting *Samaritan Inns, Inc. v. District of Columbia, 114 F.3d 1227, 1235 (D.C.Cir.1997)*). "[W]hile damages cannot be awarded on the basis of mere speculation or guesswork, the plaintiff need only provide some reasonable basis on which to estimate damages." *Id.* (internal quotations and citations omitted). To recover damages for future consequences, a "plaintiff must prove that the projected consequences are reasonably certain (i.e., more likely than not) to occur, and must prove the amount of damages by a reasonable estimate under this circuit's application of *Story*." *Id.* (internal quotations omitted).

1. Pain, Suffering and Mental Anguish

Pain, suffering and mental anguish damages are an important component of damages awarded in *§ 1605(a)(7)*

actions. "If Plaintiff presents sufficient evidence of conscious pain and suffering, determination of the compensation has largely been relegated to the discretion of the trier of fact by courts in this jurisdiction based upon factors including the duration and nature of the suffering endured." *Flatow v. Islamic Republic of Iran, 999 F.Supp. 1, 28 (D.D.C.1998)* (citing *Taylor v. Washington Terminal Co., 409 F.2d 145 (D.C.Cir.1969), cert. denied, 396 U.S. 835, 90 S.Ct. 93, 24 L.Ed.2d 85 (1969)*).

In this case, the POWs suffered pain and mental anguish during two separate periods. First, they suffered severe pain and anguish during the period of sustained mental and physical torture while in captivity in Iraq. Second, they endured—and continue to endure—pain and mental anguish resulting from the lasting injuries they sustained during the torture, painful medical treatment for those injuries, and the continuing impact on their relations with loved ones and on their professional life.

2. Emotional Distress (Solatium)

Solatium is compensation damages awarded to loved ones close to a victim for injury to feelings. *See Flatow, 999 F.Supp. at 30.* It includes mental anguish and grief resulting from the actionable conduct. "Spouses and relatives in direct lineal relationships are presumed to suffer damages for mental anguish. The testimony of sisters or brothers is ordinarily sufficient to sustain their claims for solatium." *Id.* Solatium damages for mental anguish and grief include both the time

period of the continuing offense and subsequently into the future.[9]

B. *Application*

This case involves calculated and purposeful actions by Saddam Hussein, his Republic of Iraq, and the Iraqi Intelligence Service to engage in systematic and brutal torture of American POWs while they were held by Iraq during the first Gulf War. It involves systematic and excruciating physical and mental torture carried out by experienced agents of torture in Saddam Hussein's Iraqi Intelligence Service. This physical and mental torture was inflicted throughout the period of captivity in Iraq. Iraq created an all-encompassing environment of physical and mental torture through extreme physical brutality and physical injury, mock executions, threats of death, intense fear, deprivation of medical care and exacerbation of injuries, starvation, severe sleep deprivation, imposition of squalid surroundings, intense cold, demonstrated brutality to fellow prisoners, isolation from contact with family members, fear for family members, and constant attempts to humiliate the POWs. It was accompanied by refusal to notify family members of their loved ones' capture, public threats to use the POWs as human shields, videotaping of forced statements and "confessions," and placement of POWs in targets vulnerable to attack during the course of hostilities. Because the POWs were intentionally exposed to recurrent sessions of others being

9. The family member plaintiffs are not only entitled to solatium damages but, as is discussed above, they also have a cause of action against defendants for the intentional infliction of emotional distress in relation to the torture of their loved ones.

tortured, the barbarous conditions of the POWs' confinement made every minute of their confinement one of pain, fear and emotional suffering. The pain, suffering and mental agony suffered by plaintiffs in this case did not result incidentally from some other intended act, but was inflicted intentionally to achieve extreme pain, suffering, and mental agony. The fear was greatly intensified because those tortured understood all too clearly that they were in the hands of ruthless men who would continue to escalate their treatment to horrors previously imaginable only in their worst nightmares.

While Iraq's brutal torture produced lasting physical and emotional harm, a major element of damages for the POWs must be recompense for the excruciating pain, suffering and mental anguish throughout their period of captivity in Iraq. A single minute of such torture seemed like a lifetime, but for the POW plaintiffs, it endured beyond minutes to days and weeks. For example, Colonel Acree described interrogations and beatings that "continued around the clock, separated into episodes of twenty minutes to an hour each," and he describes "longing for even a minute without pain." Acree Aff. ¶ ¶ 14, 16.

The POW plaintiffs will carry with them throughout their lives lasting physical and emotional damage. Some underwent painful medical treatments after release to repair the physical damage done by defendants. As a result, the computation of damages will be divided into two periods—the period of ongoing torture by Iraq and the subsequent period of continuing physical and emotional suffering. The same division will be made for the family members who

suffered acute mental anguish during the period of Iraqi torture of their loved ones, but who have continued to experience the numbing mental anguish resulting in long term consequences to their family.

The Court will award additional damages to those POWs subjected to the torture of specially outrageous actions by Iraq as part of its overall torture beyond its ongoing brutal beatings, physical injury, psychological torture, and barbaric conditions of confinement. These include housing POWs in a legitimate military target resulting in their being bombed, forcing POWs to make videotaped statements or "confessions" to be used as propaganda, intentionally aggravating pre-capture injuries, and conducting circumcision inspections of those POWs suspected by their Iraqi captors of being Jewish.

There are no precisely comparable cases against which to assess damages, but the brutal and extensive pain and suffering intentionally inflicted on the POW plaintiffs require damages that provide sufficient compensation and closure for the injured plaintiffs.

1. POW Plaintiffs

No one would subject himself for any price to the terror, torment, and pain experienced by these American POWs. There is no monetary award that could adequately compensate them for their suffering and the resulting permanent injury. The Court, however, is charged with providing compensatory damages even where no award can truly compensate. In shaping the most appropriate compensatory damage awards

here, the Court will calculate a lump sum award[10] that takes into account pain and suffering during and after the period of captivity, as well as pain and suffering for special outrages and major permanent impairment, as the most appropriate way to award compensation for this experience of unimaginable horror.

With respect to pain and suffering and mental anguish during the period of control and torture by Iraq, all POW plaintiffs in this case were brutally tortured. The torture experienced by each one of these POWs was unspeakable. However, there were clear differences among them, including their overall time spent under Iraqi control and torture. In awarding damages, it is appropriate to differentiate between the more severe and less severe experiences of torture in arriving at the appropriate sum.

Taking into account the relative severity of torture, it is reasonable to divide the POW plaintiffs into three groups in awarding damages for the pain, suffering and mental anguish during the period of torture. The first group includes those eight POWs who were most severely tortured, namely Col. Clifford Acree, Lt. Col. Craig Berryman, Col. (Ret.) David Eberly, CWO (Ret.) Guy Hunter, Lt. Col. H. Michael Roberts,

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10. Here, the $10,000-per-day-of-captivity formula used in some FSIA cases would not adequately compensate for the unique and egregious harms resulting from the captives' status as POWs. *Cf. Jenco, 154 F.Supp.2d at 37.* Instead, reasonable lump sum estimates aggregated from elements of each plaintiff's evidence will be used. *Cf. Cronin, 238 F.Supp.2d at 234-35* (finding that per diem approach was inappropriate because of severity of mistreatment and brevity of confinement).

Cmdr. Lawrence Slade, Lt. Col. Dale Storr, and Lt. Col. (Ret.) Jeffrey Tice. Each of these POWs will be awarded $20 million for pain and suffering during their torture.

Members of the second group of POWs will each be awarded $15 million for pain and suffering during captivity. They are Lt. Col. (Ret.) Jeffrey Fox, Sergeant David Lockett, Lt. Col. Russell Sanborn, Maj. Robert Sweet, Lt. (Ret.) Robert Wetzel, and Cmdr. Jeffrey Zaun. The third group of POWs includes former Sergeant Troy Dunlap, Maj. (Ret.) Joseph Small, and Staff Sergeant (Ret.) Daniel Stamaris. They will each be awarded $10 million for pain and suffering during the period they were held as POWs.

With respect to the pain and suffering during the period following captivity as the POWs attempted to return to a normal life, each POW plaintiff should be awarded a minimum of $2 million. Each has had to learn to deal with a life-shattering experience. Some have undergone recurrent painful medical procedures to seek to undo the physical injury done by the Iraqi torturers. Some have seen their marriages and family lives disrupted. Others have suffered in their professional lives. All have been profoundly affected and may continue to suffer for the rest of their lives. Michael Ambrose, the Director of the Repatriated Prisoner of War Program at the Naval Operational Medicine Institute (NOMI), noted that "many of the POWs continue to suffer from lingering effects of the injuries and medical problems incurred during captivity . . . and many of these problems will persist throughout the lifetime of the patients affected." Ambrose Aff. ¶ 15, 16. For each POW plaintiff whose post-captivity psychological injuries have been more severe, additional awards of

$5 million should be awarded to those with severe long-term psychological problems and $3 million should be awarded to those with moderately severe long-term psychological problems.[11]

In addition, for each POW Plaintiff suffering with permanent physical impairment from injuries inflicted by their Iraqi torturers, an additional $2 million should be awarded. The affidavits, medical reports, and expert opinions presented to the Court demonstrate that continuing injury in the period following the POWs' control by Iraq resulting from defendants' torture has continued to affect these men profoundly, physically and emotionally, and is an every day reminder of the brutality inflicted on them. The POW plaintiffs with significant permanent physical impairment are Col. Acree, Lt. Col. Berryman, Lt. Col. Fox, CWO Hunter, Sergeant Lockett, Maj. Sanborn, Cmdr. Slade, Staff Sergeant Stamaris, and Lt. Wetzel.

In addition to these amounts, each POW plaintiff suffering certain special outrages, which are singularly repugnant, deserves additional damage awards. Two million dollars will be awarded to each POW who was confined in a

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11. The determination regarding the existence and severity of long- term psychological problems is based on the affidavits of plaintiffs and the expert medical reports of Dr. Andrew Levin and Dr. Liza Gold. The POW plaintiffs with severe long-term psychological problems are Col. Acree, Lt. Col. Berryman, former Sergeant Dunlap, CWO Hunter, Lt. Col. Fox, and Sergeant Lockett. The POW plaintiffs with moderately-severe ongoing psychological problems are Col. Eberly, Maj. Small, Staff Sergeant Stamaris, and Lt. Col. Storr.

military target that was bombed by Allied forces[12] or whose pre- capture wounds were intentionally aggravated.[13] One million dollars will be awarded to each POW forced to participate in making propaganda videotapes[14] or forced to undergo the trauma of genital inspection motivated by discrimination against Jewish people.[15] *See Hill, 328 F.3d at 685* (noting additional damages for exacerbation of pre-existing condition); *Surette v. Islamic Republic of Iran, 231 F.Supp.2d 260, 269 (D.D.C.2002)* (awarding $1,000,000 for especially egregious behavior in addition to a baseline amount for each day the plaintiff was held hostage).

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12. Col. Acree, Lt. Col. Berryman, Col. Eberly, Lt. Col. Fox, CWO Hunter, Lt. Col. Roberts, Cmdr. Slade, Lt. Col. Storr, Lt. Col. Sweet, Lt. Col. Tice, Lt. Wetzel, and Cmdr. Zaun.

13. Col. Acree, Lt. Col. Fox, Sergeant Lockett, Staff Sergeant Stamaris, and Lt. Wetzel.

14. Col. Acree, Lt. Col. Berryman, Col. Eberly, Lt. Col. Fox, CWO Hunter, Lt. Col. Roberts, Cmdr. Slade, Lt. Col. Tice, Lt. Wetzel, and Cmdr. Zaun.

15. Col. Acree, Lt. Col. Berryman, Col. Eberly, Lt. Col. Fox, Cmdr. Slade, Maj. Small, Lt. Col. Storr, Lt. Col. Tice, Lt. Wetzel, and Cmdr. Zaun.

Accordingly, the Court makes the following awards to each of the POW plaintiffs as overall compensatory damages for pain and suffering:[16]

Col. Clifford Acree	$35,000,000
Lt. Col. M. Craig Berryman	$33,070,000[17]
Former Sergeant Troy Dunlap	$17,000,000
Col. (Ret.) David Eberly	$29,000,000
Lt. Col. (Ret.) Jeffrey D. Fox	$30,000,000
CWO (Ret.) Guy Hunter	$32,000,000
Sergeant David Lockett	$26,000,000
Lt. Col. H. Michael Roberts	$25,000,000
Lt. Col. Russell Sanborn	$19,000,000
Cmdr. Lawrence Randolph Slade	$28,000,000
Maj. (Ret.) Joseph Small	$16,000,000

16. The Court declines to deduct the small amounts received by some plaintiffs from the United Nations Claims Commission. *See Hill, 175 F.Supp.2d at 48* (no deduction for these small, non-exclusive payments).

17. Lt. Col. Berryman is awarded the $70,000.00 in lost wages he established through his affidavit. Craig Berryman Aff. ¶ 32.

Staff Sergeant (Ret.) Daniel Stamaris	$19,000,000
Lt. Col. Dale Storr	$28,000,000
Maj. Robert Sweet	$19,000,000
Lt. Col. (Ret.) Jeffrey Tice	$26,000,000
Lt. (Ret.) Robert Wetzel	$25,000,000
Cmdr. Jeffrey Zaun	$21,000,000

2. Spouses

Awards to spouses for mental anguish and solatium in *§ 1605(a)(7)* cases have ranged between $8 million and $12 million.[18] As was done for the POW plaintiffs, the spouses' awards for pain and suffering will be a lump sum representing an award for the suffering they endured during their husbands' period of captivity in Iraq and an award for their suffering following the release of their loved ones. The suffering the wives endured while their husbands were in captivity was severe and acute. They did not know at times whether their husbands were alive or dead. Without official notification of their husbands' captivity and health status, the wives were left to imagine the worst. They were afraid to hope and then have those hopes shattered. They were besieged by media requests for interviews, but feared that their words

18. *See, e.g., Weinstein, 184 F.Supp.2d at 23* ($8 million damages award to spouse); *Higgins v. Islamic Republic of Iran, 2000 WL 33674311 (D.D.C. Sept.21, 2000)* ($12 million damages award to spouse).

or images could be altered and used by the Iraqis to torment their husbands. An award of $4 million to each spouse is proper compensation for her suffering during the period of her husband's confinement.

The award to each spouse for her mental anguish and emotional distress following her husband's release should be $6 million. This in no way suggests that the wives suffered more severely after their husbands returned home and it does not minimize the spouses' intense suffering during the period of captivity. Instead, this amount recognizes that the post-captivity emotional distress is significantly more long-lasting. It is also compensation for each wife's loss of the life she had before her husband was captured in Iraq and which she could have reasonably expected to continue but for the egregious misconduct of the defendants. The spouses have been unintentionally stung by thoughtless comments. For example, one wife was told by her husband that she had left more food on her plate than he had to eat the entire time he was a POW. Leigh Berryman Aff. ¶ 15. They have lost sleep when their husbands suffer recurring nightmares or need to talk about their all too real experiences in Iraq. They find themselves now married to men whom they love dearly, but who differ in many ways from the men they married. They have more limited social relationships because of their husbands' physical problems or because they find it more difficult to develop personal relationships. This emotional distress, while less severe than that they endured during the weeks their loved ones were held captive in Iraq, has lasted for twelve years and may continue for years to come.

The Court, therefore, awards $10,000,000 each to the following spouses: Cynthia Acree, Leigh Berryman, Barbara Eberly, Mary Hunter, Patricia Roberts, Anna Slade, Leanne Small, and Jacqueline Wetzel. Each $10,000,000 award represents $4 million for the mental anguish and emotional distress during the period of a husband's captivity and $6 million for mental anguish and emotional distress following a husband's release.

3. Other Family Member Plaintiffs

Awards to family members for mental anguish and solatium in *§ 1605(a)(7)* cases have been made in the range $5 million to $12 million for children,[19] $5 million for parents,[20] and $2.5 million to $5 million for siblings.[21] Iraq's failure to permit notification of their loved ones' capture, public threats to use POWs as human shields, use of propaganda video of obviously tortured POWs, and its exposed use of brutal torture caused the POWs' family members, as was true for the POWs' wives, to suffer severe emotional distress during the period of captivity of their loved

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19. *See, e.g., Weinstein, 184 F.Supp.2d at 23* ($5 million damages award to children); *Higgins, 2000 WL 33674311* ($12 million damages award to child).

20. *See, e.g., Stethem, 201 F.Supp.2d at 79* ($5 million damages award to parents).

21. *See, e.g., Surette v. Islamic Republic of Iran, 231 F.Supp.2d 260, 273 (D.D.C.2002)* ($2.5 million damages award to sibling); *Elahi, 124 F.Supp.2d at 112 (D.D.C.2000)* ($5 million damages award to siblings).

ones. The family members have continued to suffer as the POWs have sought to recover from their torture. Based on the severity of their emotional distress and the past precedents in damage awards to family members in *§ 1605(a)(7)* cases, the Court awards $5 million in compensatory damages to each of the following family members: Children—Timm Eberly, Laura Hunter, William Hunter, Mary Elizabeth Hunter, and Starr Barton; Parents—Gail Stubblefield, Arthur Sweet, Mary Ann Sweet, William Wetzel, Calvin Zaun, and Marjorie Zaun; and Siblings—Ronald Dunlap, Tim Fox, Patricia Borden, Nancy Gundersen, Terry Fox, Robert Fox, David Storr, Douglas Storr, Diane Storr, Michael Sweet, Margaret Wetzel, Kate Farber, Anne Kohlbecker, Ed Wetzel, James Wetzel, Paul Wetzel, Sally Devin, and Linda Zaun Lesniak. Each $5 million award represents $2.5 million for the mental anguish and emotional distress during the period of their loved ones' captivity and $2.5 million for their mental anguish, emotional distress, and any economic damage they incurred following the POWs' release.

IV. PUNITIVE DAMAGES

Under the FSIA, a foreign state is exempt from liability for punitive damages, but punitive damages may be awarded against an agency or instrumentality by which a foreign state commits acts of torture. *See 28 U.S.C. § 1606*. General tort law principles determine whether punitive damages should be awarded and, if so, how extensive they should be. The elements include the character of the defendants' acts, the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, the need for deterrence, and the wealth of the defendants. *Flatow, 999 F.Supp. at 32*.

Appendix C

In this case, the Iraqi captors thought—correctly or incorrectly—that the POWs had information of strategic value. They wanted to extract this information by any means, which drove them to subject the POWs, particularly the pilots, to intense interrogation and torture. Defendants also considered the POWs to have strategic propaganda value that could be exploited. These inducements to torture handcuffed and blindfolded POWs resulted in unrestrained savagery against the POWs, causing them to suffer intense, justified fear that the Iraqi threats of death and dismemberment would be carried out. Because of these inducements to use torture, there must be a premium on protecting POWs. POWs are uniquely disadvantaged and deterring torture of POWs should be of the highest priority.

Punitive damages are particularly appropriate in seeking to deter terrorist states from engaging in the heinous acts designated for *§ 1605(a)(7)* actions, including torture, extrajudicial killing, aircraft sabotage, and hostage taking. Courts have awarded substantial punitive damages in *§ 1605(a)(7)* cases where plaintiffs requested such an award and the defendants in the case fell within a category subject to a punitive damage award. *See, e.g., Hill, 175 F.Supp.2d at 48* ($300 million in punitive damages against Saddam Hussein).

Plaintiffs in this case seek substantial punitive damages against the Iraqi Intelligence Service and Saddam Hussein. Creating incentives for the agencies and instrumentalities of terrorist nations to comply with their obligations not to torture POWs serves the highest public purpose. Plaintiffs in this

case not only seek to obtain appropriate recompense for their own injuries but also to take actions which will deter others in the future from torturing American POWs.[22]

The Court has considered a number of factors in assessing punitive damages. These include the exceedingly heinous nature of the acts of torture against these POWs, the severe and continuing harm to plaintiffs caused by defendants' reprehensible actions, the fact that such acts are repugnant to civilized society, and the fact that such acts were carried out by defendants as part of a systematic effort to obtain information from the POWs and to punish and intimidate Allied POWs. The record also contains evidence of the value of Saddam Hussein's personal fortune and expenditures made that supported the Iraqi Intelligence Service. Ambassador Howell states a "low-end estimate of Hussein's wealth would be $2 billion." Howell Aff. ¶ 16. The expenditures in 1990 for Hussein's presidential guard units, including the Iraqi Intelligence Service, has been calculated at "roughly three billion dollars." *See* Affidavit of Morris D. Busby, reaffirming October 9, 2001 testimony presented in *Hill v. Iraq*.

Only a very sizable award would be likely to deter the torture of American POWs by agencies or instrumentalities of Iraq or other terrorist states in the future. Taking these factors into account, the Court awards punitive damages

22. Pursuant to this objective, they have formed a non-profit foundation for the assistance of American and Allied POWs/MIAs and their families and they have committed to assign a substantial amount of any punitive damages awarded in this case to that Foundation.

against the Iraqi Intelligence Service and Saddam Hussein in his official capacity, jointly and severally, in the amount of three hundred six million dollars ($306,000,000) to be shared equally among all POW plaintiffs.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law,[23] judgment will be entered in plaintiffs' favor and against defendants, in the amounts set forth above, in a separate Final Judgment to accompany these findings and conclusions. Plaintiffs shall, at their own expense, provide notice of this judgment as required by *28 U.S.C. § 1608(e)*. They shall arrange for the Final Judgment to be translated into Arabic and present the translated Final Judgment to the Clerk of the Court. The Clerk shall cause copies of the translated Final Judgment to be addressed and dispatched to the United States Secretary of State in Washington, D.C., to the attention of the Director of Special Consular Services, for service upon defendants through diplomatic channels, pursuant to *28 U.S.C. § 1608(a)(4)*.

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23. Any finding of fact which is more properly a conclusion of law and any conclusion of law which is more properly a finding of fact shall be construed accordingly.

Appendix C

FINAL JUDGMENT

For the reasons stated in the accompanying Findings of Fact and Conclusions of Law, it is hereby

ORDERED that judgment be, and hereby is, entered in favor of plaintiffs against defendants Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service and plaintiffs are awarded compensatory damages against all defendants, jointly and severally, as follows:

Col. Clifford Acree	$35,000,000
Lt. Col. M. Craig Berryman	$33,070,000
Former Sergeant Troy Dunlap	$17,000,000
Col. (Ret.) David Eberly	$29,000,000
Lt. Col. (Ret.) Jeffrey D. Fox	$30,000,000
CWO (Ret.) Guy Hunter	$32,000,000
Sergeant David Lockett	$26,000,000
Lt. Col. H. Michael Roberts	$25,000,000
Lt. Col. Russell Sanborn	$19,000,000
Cmdr. Lawrence Randolph Slade	$28,000,000
Maj. (Ret.) Joseph Small	$16,000,000
Staff Sergeant (Ret.) Daniel Stamaris	$19,000,000
Lt. Col. Dale Storr	$28,000,000
Maj. Robert Sweet	$19,000,000
Lt. Col. (Ret.) Jeffrey Tice	$26,000,000
Lt. (Ret.) Robert Wetzel	$25,000,000
Cmdr. Jeffrey Zaun	$21,000,000
Cynthia Acree	$10,000,000
Leigh Berryman	$10,000,000
Barbara Eberly	$10,000,000
Mary Hunter	$10,000,000
Patricia Roberts	$10,000,000

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Anna Slade	$10,000,000
Leanne Small	$10,000,000
Jacqueline Wetzel	$10,000,000
Timm Eberly	$ 5,000,000
Laura Hunter	$ 5,000,000
William Hunter	$ 5,000,000
Mary Elizabeth Hunter	$ 5,000,000
Starr Barton	$ 5,000,000
Gail Stubblefield	$ 5,000,000
Arthur Sweet	$ 5,000,000
Mary Ann Sweet	$ 5,000,000
William Wetzel	$ 5,000,000
Calvin Zaun	$ 5,000,000
Marjorie Zaun	$ 5,000,000
Ronald Dunlap	$ 5,000,000
Tim Fox	$ 5,000,000
Patricia Borden	$ 5,000,000
Nancy Gundersen	$ 5,000,000
Terry Fox	$ 5,000,000
Robert Fox	$ 5,000,000
David Storr	$ 5,000,000
Douglas Storr	$ 5,000,000
Diane Storr	$ 5,000,000
Michael Sweet	$ 5,000,000
Margaret Wetzel	$ 5,000,000
Kate Farber	$ 5,000,000
Anne Kohlbecker	$ 5,000,000
Ed Wetzel	$ 5,000,000
James Wetzel	$ 5,000,000
Paul Wetzel	$ 5,000,000
Sally Devin	$ 5,000,000
Linda Zaun Lesniak	$ 5,000,000

It is further ORDERED that punitive damages in the amount of $306,000,000 be, and hereby are, awarded jointly and severally against defendants Saddam Hussein and the Iraqi Intelligence Service to be shared equally among all the POW plaintiffs. It is further

ORDERED that plaintiffs shall, at their own expense, provide notice of this Judgment as required by *28 U.S.C. § 1608(e)*. They shall arrange for the Judgment to be translated into Arabic and present the translated Judgment to the Clerk of Court. The Clerk shall cause copies of the translated Judgment to be addressed and dispatched to the United States Secretary of State in Washington, D.C., to the attention of the Director of Special Consular Services, for service upon defendants through diplomatic channels, pursuant to *28 U.S.C. § 1608(a)(4)*.

This is a final, appealable order.

APPENDIX D — ENTRY OF DEFAULT BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED SEPTEMBER 25, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 02-632 (RWR)

CLIFFORD ACREE, et al

Plaintiff(s)

v.

THE REPUBLIC OF IRAQ, et al

Defendant(s)

RE: THE REPUBLIC OF IRAQ;
THE IRAQ INTELLIGENCE SERVICE;
SADDAM HUSSEIN

DEFAULT

It appearing that the above-named defendants have failed to plead or otherwise defend this action though duly served with summons and copy of the complaint on July 22, 2002, and an affidavit on behalf of the plaintiff having been filed, it is this 25th day of September, 2002 declared that defendants are in default.

NANCY MAYER-WHITTINGTON, Clerk

By: s/ Nicole Radu
Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 19, 2004

No. 03-5232

September Term, 2003

02cv00632

Clifford Acree, Colonel, et al.,

Appellees

v.

Republic of Iraq, et al.,

Appellees

United States of America,

Appellant

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Michael C. McGrail
Deputy Clerk

APPENDIX F — RELEVANT PROVISIONS OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 97. JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

28 USCS § 1605 (2004)

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that

property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in

section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

> (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and
>
> (B) even if the foreign state is or was so designated, if—
>
> > (i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

> (ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act [8 USCS § 1101(a)(22)]) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

> (1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the

Appendix F

Ship Mortgage Act, 1920 (46 U.S.C. 911 and following [46 USCS Appx § § 911 et seq.]). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)—

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 [28 USCS § 1350 note];

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.

(1) In general.

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security

operation, related to the incident that gave rise to the cause of action.

(2) Sunset.

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

* * *

Other provisions:

Application of Nov. 9, 1988 amendments. Act Nov. 9, 1988, P.L. 100-640, § 3, 102 Stat. 3333, provided: "The amendments made by this Act [amending subsec. (b) and adding subsecs. (c) and (d) to this section, and adding subsec. (e) to 28 USCS § 1610] shall apply to actions commenced on or after the date of the enactment of this Act.".

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Application of April 26, 1996 amendments. Act April 24, 1996, P.L. 104-132, Title II, Subtitle B, § 221(c), 110 Stat. 1243, provides: "The amendments made by this subtitle [amending 28 USCS § § 1605, 1610(a), (b)(2)] shall apply to any cause of action arising before, on, or after the date of the enactment of this Act.".

Liability of agents of state sponsors of terrorism to U.S. nationals. Act Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(c) [Title V, § 589], 110 Stat. 3009-172, provides:

> "(a) An official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 [50 USCS Appx § 2405(j)] while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).
>
> "(b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall also apply to actions brought

under this section. No action shall be maintained under this action if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.".

Application of April 25, 1997 amendment. Act April 25, 1997, P.L. 105-11, 111 Stat. 22, provides that the amendment made by such Act to subsec. (a)(7)(B)(ii) of this section is effective with respect to any cause of action arising, before, on, or after the date of the enactment of such Act.

* * * *

Appendix F

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 97. JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

28 USCS § 1606 (2004)

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

* * * *

APPENDIX G — BASES FOR CAUSE OF ACTION SUBMITTED BY PETITIONERS BELOW

Legal Brief Submitted To The United States District Court For The District Of Columbia

[Commencing at page 16]

Cause of Action / Liability

Congress clearly intended its 1996 Amendments to the FSIA to strengthen deterrence against certain heinous acts committed against United States nationals by terrorist nations by authorizing civil suits against such states. To date, this Court has overwhelmingly carried out that intent in § 1605(a)(7) cases despite reliance on different theories as to the precise cause of action. Plaintiffs suggest that all of these decisions in this Court have been correct in finding a cause of action in that each of four independent legally valid bases for cause of action are available.[17]

First, § 1605 of the FSIA clearly contemplates incorporating underlying causes of action rooted in contract, property and tort, as is evidenced by §§ 1605 (a)2, (a)4, and (a)5, respectively. Further, § 1605(b) deals with certain suits in admiralty in which the underlying admiralty law is used and § 1605(d), also an admiralty provision, incorporates "the principles of law and rules of practice of suits in rem" with respect to actions concerning preferred ship mortgages. No one would suggest that cases under these sections could not go forward because these sections do not [17] separately

17. There may well also be a cause of action for torture under customary international law but, given the clarity of the cause of action on multiple grounds in this case, it is not necessary to develop this fifth basis.

establish a cause of action.[18] The point is they incorporate and facilitate perfectly basic and unremarkable underlying causes of action. And, in turn, this normal feature of the FSIA permits suits to go forward based on quite ordinary and unremarkable underlying law.[19]

This very feature of the FSIA's operation is clearly contemplated by § 1606, which provides: "The foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances. . . ." (28 U.S.C. § 1606 (2000)). Quite clearly, then, actions based on the underlying and quite conventional torts of assault, battery and intentional infliction of emotional distress are available to carry out Congress's intent in suits brought under § 1605(a)(7) concerning personal injury or death, just as, for example, § 1605(a)(5) permits suits rooted in tort to go forward. First year torts teaches that acts of assault, battery and intentional infliction of emotional distress (including all of the above in an egregious case of torture) are causes of action.[20] Not surprisingly, a number of § 1605(a)(7) cases

18. Nor can there be any question that the FSIA permits suit against a foreign state. That, after all, is what the FSIA is all about. And specifically with respect to actions under § 1605(a)(7), that provision uses the common FSIA statutory language "against a foreign state."

19. This law would include, of course, the usual principles of damages (including pain and suffering, solatium, and, unless otherwise prohibited by the FSIA with respect to the state itself, punitive damages) and respondeat superior, among other legal rules in tort cases.

20. Indeed, these modern torts come from the old forms of action at common law which were the essence of causes of action.

have proceeded on this perfectly valid basis. Thus, following a quotation of § 1606's language that a "foreign state . . . not entitled to immunity . . . shall be liable in the same manner and to the same extent as a private individual under like circumstances," the Court said in *Sutherland*: "Applying standard rules of liability, the Court finds the defendants liable on all counts alleged in the plaintiffs' complaint." The Court went on to discuss and apply the causes of action of battery, assault, false imprisonment, and intentional infliction of emotional distress. *See Sutherland v. Islamic* [18] *Republic of Iran*, 151 F. Supp. 2d 27, 47-50 (D.D.C. 2001), *aff'd*, 315 F.3d 325 (D.C. Cir. 2003). Jenco proceeds the same way, first quoting § 1606 and then again "[a]pplying standard rules of liability," discussing in turn battery, assault, false imprisonment and intentional infliction of emotional distress. *See Jenco*, 154 F. Supp. 2d at 33-37. Similarly, although not analyzing liability under specific tort headings, the Court stated in *Anderson*, "[Plaintiff] seeks compensatory damages for the following *causes of action*: battery, assault, false imprisonment, intentional infliction of emotional distress, and loss of consortium. Each of these causes of action is authorized under § 1605(a)(7) of the FSIA," and, "Terry Anderson's wife . . . seeks compensatory damages based on *causes of action* of intentional infliction of emotional distress, and loss of consortium and solatium." *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000) (emphasis added). In *Stethem*, the Court said, "[h]aving concluded that defendants are liable for *the tortious conduct alleged*, the Court next considers the extent to which the plaintiffs should be compensated for the injuries they sustained. . . ." *Stethem*, 201 F. Supp. 2d at 87 (emphasis added). And in Hill the Court said: "The essence of the tort of hostage taking is a false imprisonment. . . ." *Hill*, 175 F. Supp. 2d at 46.

Second, the 1996 Amendments to the FSIA permitting certain actions against terrorist states themselves create a cause of action "against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act. . . ." 28 U.S.C. (2000). This conclusion is supported both by the structure of the amendments as incorporated into the FSIA and by the legislative history of the 1996 Amendments. Thus, § 1605(e) specifically defines the terms torture and extrajudicial killing and these definitions are taken from the 1991 Torture Victim Protection Act that provided a civil cause of action for Americans to parallel previous [19] developments permitting tort suits by aliens under the Alien Tort Claims Act. This suggests Congressional contemplation of a cause of action against terrorist states for torture or extrajudicial killing. Moreover, the careful definitions of § 1605(e) are even more detailed and specific than the usual requirements of tort actions. This suggests a Congressional contemplation that these amendments would authorize suits by American victims against foreign terrorist states as so carefully defined in the amendments. In addition, § 1605(e) says "[n]o action shall be maintained under subsection (a)(7) unless. . . ." This language of "no action" provides support for the conclusion that § 1605(a)(7) was intended to create such an action. More importantly, this same section adds a statute of limitations specifically and solely for § 1605(a)(7) actions, a provision of law which is normally associated with a cause of action.

It is sometimes erroneously argued that the FSIA simply deals with jurisdiction, but the FSIA does many other things,

including altering the law concerning attachment, providing for venue and service of process, and, most importantly, removing immunity from suit. There is certainly no inconsistency in the Act with Amendments, added some twenty years after the original FSIA and aimed at a special problem of accountability for terrorist states, providing a cause of action in § 1605(a)(7) settings.[21] And the legislative history of these 1996 Amendments does lend support to this interpretation. Thus, the House Judiciary Report leading to these amendments stated "[s]pecifically, it [the bill] *would authorize* suits alleging extrajudicial killing, torture, aircraft sabotage or hostage-taking undertaken by, or on behalf of, a foreign government." *See* H.R. Rep. No. 104-383, at 41 (1995) (emphasis added). Similarly, the Conference Report explained: "This subtitle provides that nations designated as state sponsors [20] of terrorism . . . will be *amenable to suit* in U.S. courts for terrorist acts. It *permits U.S. federal courts to hear claims seeking money damages for personal injury or death against such nations* . . . ." H.R. Conf. Rep. No. 104-518, at 112 (1996) (emphasis added), reprinted in 199 U.S.C.C.A.N. 944, 945. Following passage of the 1996 Amendments the House Committee on the Judiciary published a Committee Brief to explain its purpose. This Brief said: "The Act allows victims and survivors . . . *to sue those countries . . . in U.S. federal courts*." The Antiterrorism and Effective Death Penalty Act of 1996: H.R. 1710/H.R. 270315. 735 – Public Law 104-132 "Brief."

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21. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), sometimes cited for the proposition that the FSIA did not create a cause of action, was decided thirteen years before the passage of the 1996 Amendments to the FSIA that were designed to add deterrence against terrorist states, and was thus solely interpreting the original 1976 Act.

Third, even if is argued that the 1996 Amendments were ambiguous, because not specific in creating a cause of action, the subsequent passage of the Flatow Amendment, § 1605 note, only five months later, makes abundantly clear this overall Congressional intent to create a cause of action against terrorist states through these two closely related 1996 Congressional enactments. These amendments, which address the same subject matter and were enacted during the same session of Congress, should be interpreted in *pari materia*.[22] Apparently a core concern of the subsequent Flatow Amendment was to expand the scope of monetary damages available against terrorist states and particularly to permit punitive damages against such states, an intention that is consistent with the 1996 Amendments creating a cause of action on their own. [21] Thus, the Conference Report on the Flatow Amendment says that the appropriations committee sought to "insert language expanding the scope

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22. *See* 1A Sutherland on Statutory Construction § 22.32 (1972). "The amendment should be considered to relate back to the enactment of 28 U.S.C. § 1605(a)(7) as if they had been enacted as one provision . . . and the two provisions should be construed together and in reference to one another . . . . Interpretation of 28 U.S.C. § 1605(a)(7) and the Flatow Amendment in *pari materia* demonstrates the coherent legislative intent behind the two enactments." *Flatow*, 999 F. Supp. at 13.

See also Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 106 n.10 (D.D.C. 2000) ("[S]ection 1605(a)(7) and the Flatow Amendment are interpreted *in pari materia*."); *Ungar*, 211 F. Supp. 2d at 93 n.3 ("Section 1605 Note, often called the Flatow Amendment, was enacted in September 1996 . . . . The two amendments are construed *in pari materia*, and the later amendment relates back to earlier one.").

of monetary damage awards available to American victims of international terrorism." H.R. Conf. Rep. No. 104-863 at 987 (Sept. 28, 1996). This language suggests that the 1996 Amendments already embodied a cause of action and certain damages in suits against foreign terrorist states. This interpretation is consistent with the subsequent statement of Congressman Jim Saxton, the Chairman of the House Task Force on Terrorism and Unconventional Warfare and a sponsor of the Flatow Amendment that: "[p]rior to the passage of the `Flatow Amendment' in Congress last year, U.S. citizens did not have 'standing' to sue a foreign state for *punitive damages*." *See* Congressional Press Release, Congressman Jim Saxton to the Flatow Family: Be Strong, America is Behind You, F.D.C.H., Inc. (Feb. 26, 1997) ("Jim Saxton Press Release") (emphasis added). The Flatow Amendment includes the language "shall be liable" and it was entitled in the final conference report "Civil Liability for Acts of State Sponsored Terrorism." As such, there can be no doubt that it created a cause of action. That cause of action should be read with the 1996 Amendments.

No evidence whatsoever suggests that Congress intended by the Flatow Amendment to restrict available causes of action against terrorist states. Indeed, it would be completely inconsistent with the statement by Congressman Jim Saxton as a sponsor of the Flatow Amendment emphasizing a purpose of that amendment to permit substantial damages against "a foreign state" to argue that following enactment of the amendment there was no cause of action against a terrorist state. In support of the interpretation that the 1996 Amendments together create a cause of action against terrorist states and their officials, many § 1605(a)(7) cases before this

Court have adopted this view. Thus, in *Flatow* this Court said: "Plaintiff brings this action pursuant to two recently enacted amendments to the FSIA, which grant jurisdiction over foreign [22] states and their officials, agents and employees, *and create federal causes of action related to personal injury or death*," and again, "Congress created jurisdiction *and federal causes of action for personal injury or death* resulting from state-sponsored terrorism, *including its own statute of limitations*." *Flatow*, 999 F. Supp. at 6, 15 (emphasis added).[23] In *Anderson* this Court said: "Section 1605(a)(7) of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), as amended, 28 U.S.C. §§ 1602 *et seq.*, provides a cause of action against a foreign state for anyone who suffered personal injury 'that was caused by an act of torture, extrajudicial killing, aircraft sabotage, *hostage taking, or the provision of material support or resources . . . for such an act. . . .*'" *Anderson*, 90 F. Supp. 2d at 113.

After discussing the relationship between the original 1996 Amendments and the Flatow Amendment, this Court said, "[T]he [Flatow Amendment] . . . provides a cause of action against a foreign state and its agents for any act which would give a court jurisdiction under 28 U.S.C.

23. *See also Flatow*, 999 F. Supp. at 12-13 (discussing the background of the Flatow Amendment and the relationship between the original 1996 Amendments in April and the Flatow Amendment in September). The statute of limitations was part of the original amendments in April of 1996, thus strongly supporting those first 1996 amendments as creating a federal cause of action. Note also this Court's use of the plural "causes of action" in its description of the combined effect of the 1996 Amendments. This is consistent with the view that *both* the April and September amendments independently created federal causes of action.

§ 1605(a)(7)." *Daliberti*, 97 F. Supp. 2d at 43. Earlier in the opinion the Court stated: "[28 U.S.C. § 1605(a)(7)] provides a cause of action against a foreign state for anyone who alleges that he or she has suffered injury 'caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act.'"[24] *Daliberti*, 97 F. Supp. 2d at 43. In *Eisenfeld*, this Court said: "the FSIA creates a federal cause of action for personal injury or wrongful death resulting from acts of state-sponsored terrorism." *Eisenfeld*, 172 F. Supp. 2d at 3. And again in *Weinstein* this Court said: "the FSIA creates a [23] federal cause of action for personal injury or wrongful death resulting from acts of state-sponsored terrorism." *Weinstein*, 184 F. Supp. at 15.

Recently, this Court carefully considered whether the Flatow Amendment creates not only a cause of action against an "official, employee, or agent" of a foreign state, but also the foreign state itself. *See Cronin*, 238 F. Supp. 2d at 231. The Court concluded, "[a]fter carefully reviewing the FSIA, the Court holds that the Flatow Amendment does provide victims of state-sponsored acts of terrorism with a cause of

24. "Because the AEDPA did not provide a *specific* cause of action for victims of state sponsored terrorism, a separate piece of legislation was enacted to fill the void. Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009 (1996) (codified at 28 U.S.C. § 1605 note). Also known as the 'Flatow Amendment,' *the legislation provides a cause of action against a foreign state and its agents* for any act which would give a court jurisdiction under 28 U.S.C. § 1605(a)(7). . . . [citing the *Flatow* case]. Plaintiffs may seek recovery under this enactment for pain and suffering, economic damages, solatium and punitive damages. 28 U.S.C. § 1605 note." *Daliberti*, 97 F. Supp. 2d at 43 n.1 (emphasis added).

action against the culpable foreign state." *Id.* The court cited three reasons for its conclusion. *Id.* First, the relationship between the texts of the 1996 initial amendments and the subsequent Flatow Amendment. On this point the Court says: "under 28 U.S.C. § 1605(a)(7), the sovereign immunity of a foreign state will be abrogated if its 'official, employee, or agent' provides material resources to the entity that commits the terrorist act. The Flatow Amendment likewise provides that an 'official, employee, or agent' of a foreign state shall be liable if their actions were taken 'while acting within the scope of his or her office, employment, or agency[.]' 28 U.S.C. § 1605(a)(7) note. In light of the identical language used in both statutory provisions, the Court finds that the *respondeat superior* implications of § 1605(a)(7) are equally applicable to the Flatow Amendment . . ." [and], "to interpret the text of the Flatow Amendment as denying a cause of action against the foreign state itself would turn the scheme of § 1605(a)(7) on its head. Instead of using the acts of officials, employees, and agents to support liability against the foreign state, the same language would be used in the [24] Flatow Amendment to deny victims of state-sponsored terrorism a cause of action against the responsible foreign state." 238 F. Supp. 2d at 231-32.

The Court's second reason is based on the legislative history of the 1996 Amendments and the subsequent Flatow Amendment. On this point the Court says: "the legislative history of 28 U.S.C. § 1605(a)(7) and the Flatow Amendment support the conclusion that victims of state-sponsored acts of terrorism have a cause of action against the foreign state itself." *Cronin*, 238 F. Supp. 2d at 232. "The stated purpose[s] of the Antiterrorism Act [are] to deter terrorist acts against

U.S. nationals by foreign sovereigns or their agents and to provide for justice for victims of such terrorism." *Elahi*, 124 F. Supp. 2d at 106 (citing 110 Stat. 1214 (1996)). *See also Flatow*, 999 F. Supp. at 12-13 ("The brief explanation of the Flatow Amendment's purpose in the House Conference Report explicitly states that it was intended to increase the measure of damages available in suits under 28 U.S.C. § 1605(a)(7)."") (citing H.R. Conf. Rep. 104-863, (1996), *reprinted in* 1996 U.S.C.C.A.N. 924). These stated intentions would both be thwarted by construing the Flatow Amendment in a manner that precludes victims of terrorism from bringing suit against the responsible foreign states. At the same time, the purposes of the legislation would clearly be advanced by victims having a cause of action against the responsible foreign state. Indeed, to construe the Flatow Amendment as not conferring a private cause of action against foreign states would mean that what Congress gave with one hand in § 1605(a)(7) it immediately took away with the other in the Flatow Amendment." 999 F. Supp. at 16-17.

The Court's third reason is that "relevant statutory provisions enacted after the Flatow Amendment also support the conclusion that it gives victims of state-sponsored acts of terrorism a cause of action against the responsible foreign state." *Id.* at 17. In this connection, the Court notes "[f]or example, the Victims of Trafficking and Violence Protection Act of 2000 ('Victims [25] Protection Act') provides a mechanism by which successful plaintiffs can recover their damage awards against foreign states and their agents from the United States government. Pub. L. No. 106-386, 114 Stat. 1464 (2000). It is inconceivable that Congress would enable plaintiffs who obtained judgments against foreign states like

Iran to recover the damage awards from the United States if the plaintiffs did not have a cause of action against the foreign state in the first place." 999 F. Supp. at 17. The Court concludes its analysis on this cause of action point by noting "[i]n holding that victims of state-sponsored terrorist attacks have a cause of action against the culpable foreign state under the FSIA, this Court joins virtually every district judge in this circuit who has addressed the issue." *Cronin*, 238 F. Supp. 2d at 233 (citing affirmatively *Surette*, *Daliberti*, *Elahi*, *Higgins*, *and Cicippio*, with a but see cite to Roeder.).[25]

Most recently, *Kerr v. Islamic Republic of Iran*, No. 01-1884 (TPJ), 2003 U.S. Dist. LEXIS 2238 (D.D.C. Feb. 11, 2003), followed the lead of Cronin in concluding that "the Flatow Amendment does provide . . . a cause of action against the foreign state itself." *Kerr*, 2003 U.S. Dist. LEXIS 2238, at * 11. On this point the Court says in full:

> In *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87 (D.C.Cir. 2002), the D.C. Circuit queried whether the plain language of the Flatow Amendment creates a federal cause of action against foreign states, noting that the amendment does not list "foreign states" among the enumerated parties against whom suit may be brought. Another judge of this district court recently responded to the court of appeals' comments in *Price* and concluded that the Flatow Amendment does provide victims of state-sponsored terrorism with a cause of action against the foreign state itself.

25. For a discussion of *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140 (D.D.C. 2002), *see* note 28 *infra* this brief.

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> *See Cronin v. Islamic Republic of Iran*, 2002 U.S. Dist. LEXIS 24115, 2002 WL 31830571 (D.D.C. Dec. 18, 2002). This construction of the Flatow Amendment is in keeping with this Court's understanding of the Flatow Amendment and comports with its own earlier decisions finding sovereign states liable for state-sponsored terrorism. *See, e.g., Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128 (D.D.C. 2001); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998).

Id. at *10 n.9.

[26] Finally, a fourth valid basis for a cause of action against a state, as well as its officials, employees or agents, is to proceed from the specific cause of action in the Flatow Amendment against an "official, employee, or agent of a foreign state designated as a state sponsor of terrorism" to liability of the foreign state through recognized principles of *respondeat superior* and vicarious liability. Nothing in the language of the 1996 Amendments (April or September) suggests a Congressional intent to shield terrorist states from their normal legal liability for the actions of their officials, employees or agents acting within the scope of their office. Indeed, the clear Congressional intent has been to hold the terrorist states accountable and to substantially increase their financial responsibility for their actions. Moreover, the very wording of the April 1996 Amendments embodied in § 1605(a)(7) that begins with "money damages . . . sought against a foreign state" then links this state responsibility to official and employee action through the language "if such act or provision of material support is engaged in by an

official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency. . . ." 28 U.S.C. § 1605(a)(7) (2000). As such, the Congress understood that a specific cause of action using precisely this same language (down to the placement of commas) in the new § 1605 note, as had been used in § 1605(a)(7) of: "official, employee, or agent . . . while acting within the scope of his or her office, employment, or agency" at minimum permitted state responsibility through the normal route of *respondeat superior*. In fact, this parallel construction between § 1605(a)(7) and § 1605 note even more strongly suggests that Congress was providing a cause of action against states, as well as their officials, employees or agents when it enacted § 1605 note, if it had not already done so in its April 1996 Amendments. But if Congress did not do so, it certainly did not intend to remove the normal *respondeat superior* principal of state responsibility for terrorist states. Whatever the judgment about [27] whether either or both of the 1996 Amendments created a federal cause of action against terrorist states, certainly the specific cause of action created against officials, employees or agents of a terrorist state in the Flatow Amendment not only serves as a valid cause of action against those officials but it leads through the application of normal legal principles to state responsibility through the application of *respondeat superior* and vicarious liability.[26]

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26. Of course, this is also consistent with § 1606 of the FSIA which provides in relevant part: "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 1606 (2000).

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This fourth valid basis for a cause of action in the § 1605(a)(7) cases has been explicitly adopted by at least one Court. In *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997), the Court said: "The Civil Liability Act [1605 note] creates a cause of action against agents of a foreign state that act under the conditions specified in FSIA § 1605(a)(7). It thus serves as an enforcement provision for acts described in § 1605(a)(7). If Plaintiffs prove an agent's liability under this Act, the foreign state employing the agent would also incur liability under the theory of *respondeat superior*." 996 F. Supp. at 1249. The Court went on to note that under the FSIA tort provision embodied in § 1605(a)(5), which preceded the 1996 Amendments, this was the normal route to state liability. Thus it continued: "*See Skeen v. Federative Republic of Brazil*, 566 F. Supp. 1414, 1417 (D.D.C. 1983) (explaining that § 1605(a)(5) 'is essentially a *respondeat superior* statute, providing an employer (the foreign state) with liability for certain tortious acts of its employees.'"). 996 F. Supp. at 1249. Similarly, "[A] foreign state sponsor of terrorism can . . . be indirectly liable for . . . damages under the principles of *respondeat superior* and vicarious liability." *Flatow*, 999 F. Supp. 1 at 25-26. *Flatow* later discussed the doctrine of *respondeat superior* as applied "to the tortious acts of individuals" under § 1605(a)(5) of the FSIA and cited a number of cases using this doctrine in that FSIA setting. 999 F. Supp. at 26.

[28] In considering the cause of action available to plaintiffs under the 1996 actions of Congress in enabling civil suits against terrorist states, whatever the specifics, Congress clearly intended in both its April and September Amendments to the FSIA to authorize suits against terrorist states. The

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Report of the House Judiciary Committee on the AEDPA stated that the legislation's purpose was to "strengthen the ability of the United States to deter terrorist acts and those who engage in terrorism." H.R. Rep. No. 104-383, at 37 (1995) ("Judiciary Report"). The Judiciary Report further stated: "Specifically, it [the April 1996, Amendments] would authorize suits alleging extrajudicial killing, torture, aircraft sabotage or hostage taking undertaken by, or on behalf of, a foreign government." *Id.* at 47. Were there no cause of action available to pursue these § 1605(a)(7) cases against foreign states, the actions of the Congress would be a nullity. No deterrence could result from an inability to bring such suits. Such a result would clearly do violence to the intent of the Congress and to the jurisprudence of this Court.

Plaintiffs submit that each and every one of the above four legal bases for cause of action in this and other § 1605(a)(7) cases are valid independent grounds.[27]

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27. A number of the § 1605(a)(7) cases before this Court have specifically determined that federal common law provides the rules of decision for such cases. *See, e.g., Flatow*, 999 F. Supp. at 14-15; *Stethem*, 201 F. Supp. 2d at 87 ("Consistent with its approach in previous FSIA cases involving claims for personal injury or death resulting from state-sponsored terrorism, this Court will evaluate plaintiffs' claims under the federal common law.") (citing *Wagner*, *Sutherland*, and *Flatow*); *Hill*, 175 F. Supp. 2d at 46 ("[I]t has been held that federal common law, rather than the law of any other foreign or domestic U.S. jurisdiction, should govern in circumstances to which the FSIA does not speak."); *Surette*, 231 F. Supp. 2d at 267 ("In conformity with previous cases decided in this district, the Court will apply federal common law to calculate damages on plaintiffs claims.").

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Given that the 1996 Anti-Terrorism Amendments to the FSIA create federal causes of action (or that, at minimum, the Flatow Amendment creates a federal cause of action), the application of federal common law (or what in the specifics of these § 1605(a)(7) actions might be thought of as "the common law of the states" per *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 333 (D.C. Cir. 2003)) would seem the appropriate choice in this case. Moreover, the 1996 [29] Anti-terrorism Amendments to FSIA generally reflect a critical national security interest of the United States, an interest that is overwhelmingly a federal interest. Further, to follow the law of individual states would lead to divergent measures of recovery against foreign defendants rather than a single national standard with respect to the liability of foreign terrorist states. Such a result would seem clearly at odds with a core purpose of the Foreign Sovereign Immunities Act.

A recent § 1605(a)(7) decision of this Court, while following federal common law, notes that on the relevant legal issues presented in the case "[t]here is no significant difference between District of Columbia and federal common law. . . ." *Ungar*, 211 F. Supp. 2d at 91 n.8. *See also Surette*, 231 F. Supp. 2d at 269 n.8 ("Although the claim of 'solatium' is not recognized as such under D.C. law, such damages may be awarded under federal common law for mental anguish. . . .") The Flatow Amendment, of course, specifically provides for solatium damages. Further, plaintiff family members in this case have a cause of action in their own right for intentional infliction of emotional distress in addition to their right to solatium.

It should be noted that many of these § 1605(a)(7) cases utilize the *Restatement (Second) of Torts* (1977), including *Flatow*, *Jenco*, *Weinstein* and *Ungar*. Plaintiffs have cited §§ 13, 18, 21 and 46 of the Restatement, discussing battery, assault, and infliction of emotional distress in their complaint.

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Collectively they make it clear that plaintiffs in this case have set out a valid cause of action in their complaint.[28]

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In *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, the D.C. Circuit recently held that the proper law to govern § 1605(a)(7) actions was "the common law of the states." 315 F.3d at 333 (citing *Burks v. Lasker*, 441 U.S. 471 (1979)). The important point of this holding is that the law of the District of Columbia, with any ambiguity concerning whether its law recognizes the right of solatium in this case, is not the controlling law. Given the specific inclusion of solatium as recoverable damages within the Flatow Amendment, this would seem compelling. *See also United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 596, 604 (1973). In making choice of law decisions in implementing a federal statutory scheme, one may not apply a state law that is inconsistent with the language or purpose of the federal statute. And the availability of solatium for the plaintiffs in § 1605(a)(7) actions has been made absolutely clear by the Congress, both as to language and purpose. The Court in *Bettis* also explicitly accepted the application of the Restatement (Second) of Torts in these § 1605(a)(7) cases.

28. A recent case before this Court, *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140 (D.D.C. 2002), concludes that the 1996 Amendments do not *unambiguously* provide for a cause of action against Iran, as opposed to the officials, employees and agents of Iran. This conclusion was reached in a setting, not presenting an issue in this case, as to whether Congress had through its 1996 Amendments to the FSIA, or any other legislation, expressed a clear intent to abrogate the Algiers Accords that resolved the hostage crisis between the United States and Iran. It should be noted that even if one concludes that the 1996 Amendments did not create a federal cause of action against the terrorist states themselves, the alternative valid bases for such a cause of action discussed above as one and four would still be fully available. Indeed, the decision seems to

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support the first basis for a cause of action as set out above: "Like all the other exceptions to foreign sovereign immunity in the FSIA, victims of state-sponsored terrorism had to look to other laws to provide a cause of action against the foreign state." 195 F. Supp. 211 at 171. Moreover, the Court, while skeptical, did not definitively decide as to whether the 1996 Amendments did or did not create such a cause of action. Thus it stated, "This Court is faced with an arguably ambiguous statutory scheme, one interpretation of which provides a cause of action against Iran. . . ." *Id.* It further wrote: "The Court agrees that it is *possible* to read these statutory provisions, in the context of legislative history and intent, to provide for a cause of action against Iran." *Id.* at 72. Implying that the Court had not made up its mind on the issue it said: "[E]ven if this Court ultimately agrees with these courts that the purpose and history of this legislation could support reading into this statute a cause of action against a foreign government, these cases [previous § 1605(a)(7) cases] in no way support plaintiffs' claim that the language of these statutes *unambiguously* requires such a conclusion." *Id.*

While recognizing that a case presenting the validity of a one-off prohibition on suit, embodied in a solemn treaty of the United States, obviously raises an important issue not present in this case, plaintiffs respectfully suggest – with conviction – that the most reasonable interpretation of the 1996 Anti-Terrorism Amendments to the FSIA in the light of their overall language, their integration one with another, and the expressed Congressional intent to authorize civil suits against terrorist states, is that these Amendments have created federal causes of action against the terrorist states as well as the officials, employees and agents of such states. Why would the Congress have added the Flatow Amendment to the FISA *unless it intended to affect foreign states*? *That*, after all, is the exclusive focus of the FSIA. We always run the risk, as Mr. Justice Holmes reminded us in his dissent in *Northern Securities Co. v. United States*, 193
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[30] The torture of plaintiff POWs, as is shown in the supporting evidence presented to the Court, and the resulting mistreatment and injury to their families, constitute traditional torts of assault, battery and intentional infliction of emotional distress. Plaintiffs' claims satisfy each of the elements of these traditional torts. The torture of American POWs involved numerous acts of officials, employees or agents of the Government of Iraq acting within the scope of their office and intending, in a most brutal way, to cause a harmful or offensive contact with a person or an [31] imminent apprehension of such a contact, in fact putting the POWs in imminent apprehension. Similarly, the torture of plaintiff POWs presents numerous acts of the officials,

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U.S. 197 (1904), that "[g]reat cases like hard cases make bad law." 193 U.S. at 400-01. An important case presenting the question of whether the United States will live up to its specific solemn treaty obligations obviously is quite a different case than the general § 1605(a)(7) case against terrorist states seeking to hold *those states* to the rule of law. Moreover, even if these Amendments have created such a cause of action, as many cases before this Court we believe have correctly held, this does not clearly indicate whether the Congress did or did not seek to abrogate the Algiers Accords by these or any other legislative enactments. That is, the Flatow Amendment can be ambiguous with respect to this crucial point in the Roeder case without any ambiguity as to whether the Amendment creates a federal cause of action against terrorist states, as well as their officers, employees and agents.

In a recent decision in *Bettis*, 315 F.3d 325, the Court of Appeals for the District of Columbia Circuit cited to both the Roeder and Cronin decisions without reaching the issue of whether the Flatow Amendment furnishes a basis for a cause of action against a defendant state. *Id.* at 330.

employees or agents of the Government of Iraq acting within the scope of their office intentionally causing harmful or offensive contact where such contact occurred.

With respect both to the American POWs and their family members, there is ample evidence of extreme and outrageous conduct by such officials, employees, or agents intentionally or recklessly causing severe emotional distress. Indeed, the very act and purpose of the continuing torture of American POWs by the Government of Iraq was to create a total climate for the POWs and their families that was one of constant and severe emotional distress. This climate of fear of torture and death for the POWs was based in turn on severe physical and mental abuse delivered by their captors in order to serve objectives of the Government of Iraq, its Intelligence Service, and its President Saddam Hussein, in Iraq's continuing war of aggression in defiance of the United Nations Security Council. Public awareness of Iraq's propensity to murder and torture, along with the failure properly to effectuate notice or to permit POWs to write to their families as required by provisions of the Third Geneva Convention, forced propaganda tapes by injured POWs, refusal to permit the International Committee of the Red Cross ("ICRC") to inspect the prisoners' conditions, and a public announcement by Iraq that POWs would be used as human shields, in turn intentionally and recklessly created severe and enduring emotional distress for family members. *See, e.g., Sutherland*, 151 F. Supp. 2d at 47-50; *Jenco*, 154 F. Supp. 2d at 33-37 (discussing these traditional bases for causes of action and liability rooted in tort and applicable through § 1605 of the FSIA). With respect to the traditional [32] torts of battery,

assault, and infliction of emotional distress, see Restatement (Second) of Torts §§ 13, 18, 21, and 46 (1965).[29]

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29. Section 13 "Battery: Harmful Contact" provides:

> An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results. Section 18 "Battery: Offensive Contact" provides:
>
> An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the other directly or indirectly results. . . . Section 21(1) "Assault" provides:
>
> An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension. Section 46 "Outrageous Conduct Causing Severe Emotional Distress" provides:
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

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Plaintiff family members qualify in their own right as entitled to a recovery rooted in the intentional infliction of emotional distress. Clearly the actions of defendants were outrageous and caused severe emotional distress to the family members. Further, the actions of defendants were in important ways directed against the family members themselves. Thus, defendants sought to coerce from the POWs their family members' names and addresses, threatened to send [33] the POWs' body parts to their families, and failed to comply with their legal obligation under Article 70 of the Third Geneva Convention, intended for the protection of family members as well as POWs, to permit a POW "to write direct to his family . . . inform[ing] his relatives of his capture, address and state of health." Geneva Convention art. 70. As such, family members make out a case under § 46(1) of the Restatement (Second) of Torts. They also make out a case under § 46(2) because they were aware at the time of much of the torture and Iraqi misconduct causing their emotional distress, rather than simply learning about it after the fact, and thus they were "present" within the meaning of this subsection. Comment 1 to § 46 of the Restatement

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> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
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> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.

clarifies the meaning of "present at the time" in this subsection (2) as "distinguished from those who discover later what has occurred." Restatement (Second) of Torts § 46 cmt. 1(1965). In this respect, outrageous actions of Iraq of which the family members were aware at the time included televised propaganda broadcasts featuring their battered family members or other POWs, public threats to use their family members as human shields, Iraq's refusal to permit notice of capture or written communication or to permit access to the POWs by the ICRC, and public reporting and knowledge concerning past and ongoing participation of defendants in brutal torture.

Moreover, § 46 includes an important *caveat* that: "The Institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress" and Comment 1 elaborates that: "The Caveat is intended . . . to leave open the possibility of situations in which presence at the time may not be required." *See* Restatement (Second) of Torts § 46 caveat & cmt. 1 (1965). Certainly in relation to the principal reasons for limiting this tort by the presence requirement, a fear of an open-ended application to the public at large, or fear of insincere invocation upon [34] discovery of an outrageous action years later, the application to the family member plaintiffs in this case presents no such threat. This analysis is in no way inconsistent with *Bettis*, 315 F.3d at 333-37.[30]

30. The Court in *Bettis* did not have before it a § 46(1) case with strong evidence that the actions of defendants were specifically directed against family members, as is present in this case, nor did it decide the scope of the "presence" requirement of § 46(2). *See Bettis*, 315 F.3d at 333-35.

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The concern in *Bettis* principally related to whether nieces and nephews were "immediate family" within the meaning of § 46(2).[31] That issue is not presented here. Most importantly, even if the family member plaintiffs in this case did not qualify for recovery in their own right, under the Flatow Amendment they clearly qualify for solatium damages for their full emotional distress.

Plaintiff POWs' affidavits in this case clearly present the traditional torts of assault, battery and intentionally or recklessly causing severe emotional distress committed against them. Plaintiff family members plainly may pursue a cause of action for the intentional and reckless acts of the Government of Iraq and its officials, employees and agents causing severe emotional distress to them. These family members are also entitled, as will be discussed in the next section, to solatium damages in relation to the causes of action brought by their close relatives as POW plaintiffs.

The outrageous acts of defendants in this case, while constituting traditional torts, go far beyond traditional tort causes of action as bases of liability. They constitute a brutal and outrageous breach of trust and a shocking violation of international human rights norms aimed at the American nationals in this case. As noted above, § 1605(a)(7), *as amended*, of the FSIA, [35] creates an independent federal cause of action for this brutal torture and provision of material

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31. The Court in *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27 (D.D.C. 2001), defined "immediate family" for the related purpose of the tort of intentional infliction of emotional distress as one's "spouse, parents, siblings, and children." *Jenco*, 154 F. Supp. 2d at 35-36 n.8. This quotation was reiterated in *Bettis*, 315 F.3d at 331.

support for it, as against American national plaintiffs. In this respect, this legislative provision is a unique provision of the FSIA intended not only to remove immunity but more broadly to serve as a deterrent to such acts directed against, or affecting, American nationals. Congress's intent in enacting these provisions in 1996 was to deter such acts against American nationals by terrorist nations and, in order to ensure such deterrence, to ensure that substantial monetary damage awards were available to covered American plaintiffs when the conditions of § 1605(a)(7) were met, as they have been here.

* * * *

Appendix G

Proposed Findings Of Fact And Conclusions Of Law Submitted To The United States District Court For The District Of Columbia

[Commencing at page 80]

* * *

B. Liability

Congress clearly intended its 1996 amendments to the FSIA to strengthen deterrence against certain heinous acts committed against United States nationals by terrorist nations by authorizing civil suits against such states. To date, this Court has overwhelmingly carried out that intent in § 1605(a)(7) cases despite reliance on a variety of bases to provide the cause of action. These decisions have been correct in finding a cause of action in these cases since there are, in truth, multiple legally valid bases for such a finding.

First, § 1605 of the FSIA clearly contemplates incorporating the underlying causes of action rooted in contract, tort, and property, as is evidenced by § 1605 §§ (a)2 [commercial activity], (a)4 [property acquired by succession or gift or real property], and (a)5 [tortious acts]. No one would suggest that cases under these sections could not go forward because these sections do not separately establish a cause of action. The point is, they incorporate and facilitate perfectly basic and unremarkable underlying causes of action. This feature of the FSIA permits suits to go forward based on the unremarkable underlying law. Indeed, this very feature of the [81] operation of the FSIA is clearly

contemplated by § 1606 which provides: "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 1606. Quite clearly, then, actions based on the underlying and quite conventional torts of assault, battery and intentional infliction of emotional distress, as are presented in this case, are available to carry out the intent of Congress in suits brought under § 1605(4)(7) concerning personal injury or death, just as, for example § 1605(4)(5) permits suits rooted in tort to go forward. Multiple opinions of this Court have correctly supported this conclusion. *See, e.g., Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 47-50 (D.D.C. 2001), *aff'd*, 315 F.3d 325 (D.C. Cir. 2003); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 33-37 (D.D.C. 2001) *aff'd*, 315 F.3d 325 (D.C. Cir. 2003); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000); *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78, 87 (D.D.C. 2002); *Hill v. Republic of Iraq*, 175 F. Supp. 2d 36, 45-46 (D.D.C. 2001).

Second, it is abundantly clear that the "Flatow Amendment" at minimum creates a federal cause of action against officials, employees, or agents of a foreign state sponsor of terrorism while acting within the scope of their office, employment or agency. Those Courts which have held that this then leads to state liability under the principles of *respondeat superior* and vicarious liability are also correct. *See Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1249 (S.D. Fla. 1997); *Flatow*, 999 F. Supp. at 25-26.[14]

14. While this case proceeds under national law, international law also attaches state responsibility for the actions of its organs, entities or persons empowered to exercise governmental (Cont'd)

[82] Third, in addition to these two previous bases, § 1605(a)(7) and the "Flatow Amendment" (that is, the two sets of 1996 amendments to the FSIA), together create a federal cause of action against officials, employees and agents of a foreign state, as well as the state and its agencies and instrumentalities themselves. *See Flatow*, 999 F. Supp. at 6, 15; *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000); *Daliberti*, 97 F. Supp. 2d at 43; *Eisenfeld*, 172 F. Supp. 2d at 7; *Weinstein*, 184 F. Supp. 2d at 24; *Cronin v. Islamic Republic of Iran*, 238 F.Supp. 2d 222, 230-31 (D.D.C. 2002); *Kerr v. Islamic Republic of Iran*, __ F. Supp. 2d __, __, No. 011994 (TPJ), 2003 U.S. Dist. LEXIS 2238 at *3 n.9 (D.D.C. Feb. 11, 2003). In creating a statute of limitations for § 1605(a)(7) actions, § 1605(f) uses the language "[n]o action shall be maintained under subsection (a)(7) unless. . . ." This supports the conclusion that § 1605(a)(7), as opposed to earlier enacted provisions

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(Cont'd)

authority. *See, e.g.*, International Law Commission's Articles on State Responsibility arts. 4, 6 ("ILC Articles"). James Crawford, The International Law Commission's Articles On State Responsibility 61-62 (2002). Further, article 7 of the ILC Articles affirms this principle even if the organ, entity or person "exceeds its authority or contravenes instructions." *Id.* at 62. Even more specifically with respect to the treatment of POWs, article 12 of the Third Geneva Convention specifically provides: "Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them." Geneva Convention art. 12. The responsibility here, of course, is that of the state itself. Thus, article 1 of the ILC Articles states the classic principle of state responsibility: "Every internationally wrongful act of a State entails the international responsibility of that State." *Crawford, supra*, at 61. And the High Contracting Party to the POW Convention is the State of Iraq.

of the FSIA,[15] was intended to create an action to be maintained under that section. More importantly, this same section adds a statute of limitations specifically and solely for § 1605(a)(7) actions, a provision of law which is normally associated with a specific cause of action.

The FSIA does not deal solely with jurisdiction. Additionally, it alters the law concerning attachment, providing for venue and service of process, and most importantly, removing [83] immunity from suit. There is certainly no inconsistency in the Act with amendments, added some twenty years after the original FSIA and aimed at a special problem of accountability for terrorist states, providing a cause of action in § 1605(a)(7) settings.

The legislative history of the original 1996 amendments also lends support to this plain language interpretation. The House Judiciary Report leading to these Amendments stated: "[s]pecifically, it [the bill] *would authorize* suits alleging extrajudicial killing, torture, aircraft sabotage or hostage taking undertaken by, or on behalf of, a foreign government." H.R. Rep. No. 104-383, at 41 (1995) (emphasis added). Similarly, the Conference Report explained; "This subtitle provides that nations designated as state sponsors of terrorism . . . will be *amenable to suit* in U.S. courts for terrorist acts. It *permits US. federal courts to hear claims seeking money damages for personal injury or death against such nations*. . . ." H.R. Conf Rep. No. 104-518, at

15. *See First Nat 'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (noting that the original provisions of the 1976 FSIA did not create a cause of action).

112 (1996) (emphasis added), *reprinted in* 1996 U.S.C.C.A.N. 944, 945. Following passage of the original 1996 amendments the House Committee on the Judiciary published a Committee Brief to explain its purpose. This Brief said: "The Act allows victims and survivors . . . *to sue those countries . . . in U.S. federal courts*." (Emphasis added.) Finding no cause of action in the face of this clear language would be a strange interpretation indeed.

Further, even if it is argued that the original 1996 amendments were ambiguous as to creating a cause of action, the subsequent passage of the "Flatow Amendment," § 1605 Note, only five months later, makes this overall Congressional intent abundantly clear. These amendments, which address the same subject matter and were enacted during the same session of Congress, should be interpreted in *pari materia*. *See Flatow*, 999 F. Supp. at 13; 1A *Sutherland* [84] *on Statutory Construction* § 22.32 (1972). Apparently, a core concern of the subsequent Flatow Amendment was to expand the scope of monetary damages available against terrorist states and particularly to permit punitive damages against such states. The provision is *only* consistent with a Congressional understanding that a cause of action already existed. Thus, the Conference Report on the Flatow Amendment says that the appropriations committee sought to "insert [ ] language expanding the scope of monetary damage awards available to American victims of international terrorism." H.R. Conf. Rep. No. 104-863, at 985.

This language suggests that the 1996 amendments already embodied a cause of action and certain damages in

suits against foreign terrorist states. This interpretation is consistent with the subsequent statement of Congressman Jim Saxton, the Chairman of the House Task Force on Terrorism and Unconventional Warfare and a sponsor of the Flatow Amendment that: "[p]rior to the passage of the 'Flatow Amendment' in Congress last year, U.S. citizens did not have 'standing' to sue a foreign state for *punitive damages*." *See* Congressional Press Release, Congressman Jim Saxton to the Flatow Family: Be Strong, America is Behind You, F.D.C.H., Inc. (Feb. 26, 1997) (emphasis added). The Flatow Amendment specifically includes the language "shall be liable" and it was entitled in the final conference report "Civil Liability for Acts of State Sponsored Terrorism." As such, there can be no doubt that it created a cause of action. That cause of action should be read with the 1996 amendments. There is simply no evidence whatsoever that Congress intended by the "Flatow Amendment" to restrict available causes of action against terrorist states.

[85] Subsequent statutory provisions by Congress clearly support the conclusion that Congress intended to create a cause of action against responsible terrorist states for injured American nationals. For example, the Victims of Trafficking and Violence Protection Act of 2000 ("Victims Protection Act"), and § 201 of the Terrorism Risk Insurance Act of 2002, both provide a mechanism for § 1605(a)(7) plaintiffs to recover their damage awards.

This conclusion, that the 1996 amendments together create a federal cause of action against terrorist states and their agencies and instrumentalities, as well as against their officials, employees and agents, has strong support in the

jurisprudence of this Court. *See Flatow*, 999 F. Supp. at 6, 15; *Anderson*, 90 F. Supp. 2d at 113; *Daliberti*, 97 F. Supp. 2d at 43; *Eisenfeld*, 172 F. Supp. 2d at 7; *Weinstein*, 184 F. Supp. 2d at 24; Cronin, 238 F. Supp. 2d at 230-31; *Kerr*, 2003 U.S. Dist. LEXIS 22380 at *3 n.9 (Feb. 11, 2003).

In the recent *Cronin* case, the Court carefully considered whether the Flatow Amendment creates not only a cause of action against an "official, employee, or agent" of a foreign state, but also the foreign state itself. The Court concludes: "[a]fter carefully reviewing the FSIA, the Court holds that the Flatow Amendment does provide victims of state-sponsored acts of terrorism with a cause of action against the culpable foreign state." 238 F. Supp. 2d at 231.[16] And in the most recent of these cases, *Kerr*, Judge Thomas Penfield Jackson explicitly adopts the construction in Cronin, concluding "that the Flatow Amendment does provide . . . a cause of [86] action against the foreign state itself." *See Kerr v. Islamic Republic of Iran*, 2003 U.S. Dist. LEXIS 22380 at *3 n.9.

This Court holds that, at minimum, the 1996 amendments together create a federal cause of action against terrorist states and their agencies and instrumentalities, as well as against officials, employees and agents of such states, as specified in § 1605(a)(7), as amended in § 1605(a)(7) Note. It should

16. The Court cited three groups of points in support of its conclusion. These related to the relationship between the texts of the 1996 initial amendment and the subsequent Flatow Amendment, the legislative history of both amendments, and Congress's subsequent enactment of statutory provisions assuming that these amendments provide a cause of action to American nationals against terrorist states.

be borne in mind in considering the cause of action available to American claimants under the 1996 actions of Congress in enabling civil suits against terrorist states that, whatever the specifics, Congress clearly intended in both its April and September Amendments to the FSIA to authorize suits against terrorist states. The Report of the House Judiciary Committee on the Anti-Terrorism and Effective Death Penalty Act of 1996 stated that the legislation's purpose was to "strengthen the ability of the United States to deter terrorist acts and those who engage in terrorism." H.R. Rep. No. 104-383, at 37 (1995) ("Judiciary Report"). The Judiciary Report further stated: "Specifically, it [the April 1996, Amendments] would authorize suits alleging extrajudicial killing, torture, aircraft sabotage or hostage taking undertaken by, or on behalf of, a foreign government." *Id.* at 47. Were there no cause of action available to pursue these § 1605(a)(7) cases against foreign states, the actions of the Congress would be a nullity. No deterrence could result from an inability to bring such suits. Such a result would do violence to the intent of the Congress and the jurisprudence of this Court. Moreover, as previously noted, even if these statutory provisions did not themselves create a cause of action [87] against the terrorist states and their agencies and instrumentalities, at least two other legally valid bases for such a cause of action exist in this case.

* * * *

Appendix G

Excerpts From The Transcript Of The Oral Argument Before The Court Of Appeals For The District Of Columbia Circuit In *Acree v. Republic of Iraq*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5232

CLIFFORD ACREE, COLONEL, *ET AL.*,

Plaintiffs-Appellees,

v.

REPUBLIC OF IRAQ, *ET AL.*,

Defendants,

and

UNITED STATES OF AMERICA,

Appellant.

Wednesday, April 7, 2004

Washington, D.C.

* * *

Appendix G

[Commencing at page 20]

* * *

ORAL ARGUMENT OF STEWART A. BAKER, ESQ.
ON BEHALF OF THE APPELLEES

MR. BAKER: Good morning. May it please the [21] Court. Before turning to the *Cicippio* question, I just would like to address the suggestion that I think was a theme of the argument before, that this is about facilitating the reconstruction of Iraq and rebuilding democracy. There was a time when that issue was presented here. At the beginning of this case, the judgment it looked as though might interfere with the transfer of funds because of the attachment of those funds to Iraq for reconstruction purposes. But that issue has been washed out by a prior determination here that those funds are U.S. funds and not subject to attachment.

Similarly, there's no risk that this judgment will be used to interfere with the reconstruction of Iraq by attaching Iraqi oil assets or other assets that are important for the reconstruction of Iraq because the President has issued an executive order that makes it impossible for anyone to attach those assets.

It's not even about the possibility that this judgment will be taken elsewhere in the world in an effort to attach assets there, because the U.N. Security resolution calls on all nations to prevent attachment of Iraqi petroleum resources at least until the year 2008.

All that is at stake here is a judgment that's been entered under the Foreign Sovereign Immunities Act against a nation

that is now an ally of the United States. This is [22] something that the Foreign Sovereign Immunities Act contemplated when it was enacted in 1976. It has not changed.

And finally, this is unlike the situation in postwar Germany in that the President has not exercised the authority he has to settle, to resolve American claims against Iraq. He's not entered into an executive agreement or a treaty that would set aside these claims. That is still a possibility, and it is still quite likely that at some point all of the debts that Saddam Hussein racked up will be settled in some fashion. The question, I think, is when the French oil traders and the Russian armament dealers line up and say, well, Saddam Hussein signed this contract and he owes me money, so I want the government of Iraq, whether our judgment will be among the debts that Saddam Hussein racked up that ought to be paid.

But let me talk now about the Cicippio question. There's no doubt that this would require an exercise of discretion on the part of this Court that I think would be fairly characterized as heroic. This issue was waived by Iraq when it failed to file in the case below. It did not file a motion to dismiss for failure to state a claim, and it did not appeal. This issue has not been raised on appeal as it was (indiscernible) for the first time. It hasn't been raised at all. The United States has been [23] quite candid in saying that they --

JUDGE ROBERTS: Mr. Baker, let me suggest a way, though, in which the issue is intertwined with the jurisdictional question, which of course we do have nondiscretionary responsibility to address. And that is that

if you follow the retroactivity issue to the end of the line, you eventually get to a point where you have to decide whether to follow the precedents that suggest we do not apply statutes retroactively when they interfere when substantive rights, or at least there's a presumption against that, or a body of precedent that says jurisdiction-ousting statutes are applied from the moment they're enacted. And if you're struggling with that question, it is pertinent to know whether or not you are going to interfere with substantive rights. And if it turns out you don't have a cause of action, then the answer to that may be no, which makes the resolution of that jurisdictional question much easier.

MR. BAKER: I think that's a fair point. If *Cicippio* had said there is no possibility that these claims can be pursued on any theory, or if our complaint had rested exclusively on 1607(a)(5), then that would be an appropriate response. But neither of those is true. The *Cicippio* case expressly sent the case back to the district court to determine whether there were state law grounds for [24] pursuing a tort judgment, and there are a number of cases that have brought claims against foreign nations not under a Flato (phonetic sp.) Amendment theory or a 1607(a)(5) theory but on straight common law tort, and indeed, that is what our case rested on as well. Our complaint makes it clear that we rest on 1607(a)(5), then it says and we are also pleading the common law torts.

JUDGE EDWARDS: But did the district court purport to issue a judgment on terms other than 1605?

MR. BAKER: It think fairly read it does. We had said in our complaints, and we --

JUDGE EDWARDS: No, I'm not asking what you thought you were asking for in the complaint. I'm asking what you thought the district court did in response to it. I didn't see that. I missed that.

MR. BAKER: But the Court discussed this at length, the common law torts of assault and battery and intentional infliction of emotional distress.

JUDGE EDWARDS: Well, that's merely because the statute reaches out and seeks to inform itself about the common law in order to reach a substantive judgment. But that's very different from saying your jurisdictional base is not 1605 but state common law.

MR. BAKER: It --

JUDGE EDWARDS: I didn't see that.

[25] MR. BAKER: I would not say that I can point you to a line that says I am now turning to a separate theory of liability. However, I think if you examine what the Court did in the light of what we asked for in our complaint and also in light of what we asked for in our proposed conclusions of law, we made it quite clear that when we were talking about the common law torts of assault and battery and intentional infliction of emotional distress that we were talking about them under a common law state theory.

JUDGE EDWARDS: What state theory do you think you were resting on? Whose state?

MR. BAKER: We were not challenged to identify the state, but --

JUDGE EDWARDS: Well, but I mean, that's my whole point. I don't mean to be cute, but I think it is not fair for you to suggest the most you have in response to Judge Roberts's argument, if that's the argument, is we would ask that the Court remand for us to try and make out a case on diversity and see if we can win. But there isn't a determination with respect to an appropriate state action and what the law of that state is and whether or not you satisfied it. I don't see that at all.

MR. BAKER: Well --

JUDGE EDWARDS: Reaching out to the common law in [26] a 1605 case is, you know, that's what we do. It's this kind of vague notion. You kind of go out there fishing for the common law generally and see what you come up with. So that doesn't help you.

MR. BAKER: Well, I --

JUDGE EDWARDS: That's what you do in 1605.

MR. BAKER: I understand that, and I'm going to have to make a reference to something that's not in the joint appendix but is in the record, which is what we submitted as our proposed findings of fact and conclusions of law, and in

a footnote, when we were talking about this, we said in addition to the relevant statutory --

JUDGE EDWARDS: This is in a footnote, right?

MR. BAKER: This in a footnote.

JUDGE EDWARDS: Okay. A footnote not in our record.

MR. BAKER: Well, it's not in our record because this issue hasn't been raised by anybody up to now.

JUDGE EDWARDS: No, what I'm saying is I don't -of course it hasn't been raised. I understand that. The question is assuming we can get you here, that is, that it is before us, then it becomes a problem.

MR. BAKER: Right. But I think the question is what did the district court have before it when it was talking about all of these --

[27] JUDGE EDWARDS: What did the district court mean to do?

MR. BAKER: Mean to do.

JUDGE EDWARDS: Right.

MR. BAKER: How can we understand what the court's extensive discussion of all of these common law torts should be interpreted? I think it's relevant that we said in addition to the statutory provisions, federal common law, or more precisely, the common law of the states, provides the rules.

* * * *

APPENDIX H — OPINION IN *CICIPPIO-PULEO v. ISLAMIC REPUBLIC OF IRAN* OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED JANUARY 16, 2004

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 02-7085

ELIZABETH A. CICIPPIO-PULEO, *et al.*,

Appellants,

v.

ISLAMIC REPUBLIC OF IRAN and
IRANIAN MINISTRY OF INFORMATION
AND SECURITY,

Appellees.

Argued December 15, 2003

Decided January 16, 2004

Before: EDWARDS, RANDOLPH, and GARLAND, *Circuit Judges*.

Opinion for the Court filed by Circuit Judge EDWARDS.

HARRY T. EDWARDS, *Circuit Judge*:

This case involves a lawsuit brought against the Islamic Republic of Iran ("Iran") under the terrorism exception, 28 U.S.C. § 1605(a)(7), to the Foreign Sovereign Immunities

Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11 (2000). The plaintiffs in the suit are the adult children and siblings of Joseph J. Cicippio, a victim of terrorist hostage-taking. Joseph Cicippio was abducted in 1986 by Hizbollah, an Islamic terrorist organization that receives material support from Iran. He was held hostage until 1991, confined in inhumane conditions and frequently beaten. In 1996, Joseph Cicippio and his wife sued Iran for the tortious injuries they sustained as a result of Mr. Cicippio's kidnaping, imprisonment, and torture. Iran failed to respond to the complaint and default was entered on November 13, 1997. The case was tried *ex parte* and, on August 27, 1998, the District Court entered judgment against Iran in favor of Mr. and Mrs. Cicippio in the amount of $30 million. *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64, 70 (D.D.C. 1998). No appeal was taken.

In 2001, Joseph Cicippio's children and siblings sued Iran for the intentional infliction of emotional distress and loss of solatium they suffered as a result of Mr. Cicippio's ordeal. The Iranian defendants failed to respond to the complaint and the District Court entered default on January 2, 2002. The Cicippios filed a motion for summary judgment on January 10, 2002. Subsequently, on January 24, 2002, plaintiffs moved to consolidate their suit with Mr. and Mrs. Cicippio's case, which by then had been closed. On June 21, 2002, the District Court denied the motions for summary judgment and consolidation. The court also *sua sponte* dismissed the Cicippios' complaint under Federal Rules of Civil Procedure 12(b)(6) and 12(h)(3), holding that "the FSIA, as amended, does not confer subject matter jurisdiction upon it to entertain claims for emotional distress and solatium

brought by claimants situated as are these plaintiffs upon the allegations of their complaint." *Cicippio-Puleo v. Islamic Republic of Iran*, Civ. No. 01-1496, slip op. at 2, (D.D.C. June 21, 2002), *reprinted in* Appendix ("App.") 3, 4. Joseph Cicippio's children and siblings now appeal. Responding to our request, the Justice Department has filed a brief as *amicus curiae* stating the position of the United States. The Government's position is that neither section 1605(a)(7) of the FSIA nor the Flatow Amendment, 28 U.S.C. § 1605 note, creates a private cause of action against foreign governments for acts of hostage taking or torture.

We affirm the judgment of the District Court. Section 1605(a)(7) of the FSIA abrogates foreign sovereign immunity and provides jurisdiction in specified circumstances, but it does not create a private cause of action. By its clear terms, the Flatow Amendment provides a private right of action only against individual officials, employees, and agents of a foreign state, but not against a foreign state itself. Plainly, neither section 1605(a)(7) nor the Flatow Amendment, separately or together, establishes a cause of action against foreign state sponsors of terrorism. Therefore, the Cicippios' suit cannot proceed on these grounds. However, because the Cicippios' suit was filed in the wake of judgments in favor of Mr. and Mrs. Cicippio and other hostage victims, they may have been misled in assuming that the Flatow Amendment afforded a cause of action against foreign state sponsors of terrorism. We therefore affirm the judgment of the District Court, but remand the case to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law. We reserve judgment, however, on whether the Cicippios have any viable basis for an action against Iran, leaving that issue to the District Court in the first instance.

Appendix H

I. BACKGROUND

A. Facts

On the morning of September 12, 1986, Joseph. J. Cicippio was kidnaped in Beiruit, Lebanon, by the terrorist group Hizbollah, an agent of Iran's Ministry of Information and Security ("MOIS"). At the time of his abduction, Mr. Cicippio was comptroller of the American University of Beiruit. Hizbollah held him hostage for 1,908 days. During that time, he was randomly beaten, confined in rodent- and scorpion-infested cells, and bound by chains. He suffered from numerous medical problems emanating from the inhumane treatment that he experienced during his captivity. At some point after Mr. Cicippio was taken hostage, he was forced to undergo major surgery for an unidentified abdominal condition that has left a ten-inch scar on his abdomen. *See Cicippio*, 18 F. Supp. 2d at 66.

In 1996, Joseph Cicippio filed suit against Iran under the "terrorism exception" to the FSIA, 28 U.S.C. § 1605(a)(7), and the Flatow Amendment, 28 U.S.C. § 1605 note. His lawsuit was joined by his wife, Elham Cicippio, two other hostage victims, and the wife of one of the other victims. The Iranian defendants did not respond to the complaint and were found in default. The case was tried *ex parte* and, on August 27, 1998, the District Court rendered a judgment for Joseph Cicippio in the amount of $20 million in damages for lost wages and opportunities and compensatory damages for pain and suffering and mental anguish, and $10 million for Mrs. Cicippio in damages for loss of her husband's society and companionship and mental

anguish. *See Cicippio*, 18 F. Supp. 2d at 64, 70. Iran never entered an appearance in the case and no appeal was taken from the judgment of the District Court.

The instant case arises from a lawsuit brought in 2001 by Joseph Cicippio's seven adult children and seven siblings against Iran and MOIS for the intentional infliction of emotional distress and loss of solatium they sustained as a result of Mr. Cicippio's ordeal. The suit was based on claims purporting to arise under section 1605(a)(7) and the Flatow Amendment. On January 2, 2002, after Iran failed to respond to the complaint, the District Court entered a default judgment for the Cicippio children and siblings. On January 10, 2002, the Cicippios filed a motion for summary judgment. They subsequently filed a motion to consolidate their case with Mr. and Mrs. Cicippio's lawsuit against Iran, which by then had been closed. The motion for summary judgment included affidavits from the children and siblings establishing that Mr. Cicippio's captivity caused them to suffer from emotional distress by virtue of the harm done to him.

B. The Statutory Framework

The FSIA provides that "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Under the FSIA, foreign states enjoy immunity from suit in U.S. courts unless Congress waives immunity under an enumerated exception. In 1996, as part of the comprehensive Antiterrorism and

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Effective Death Penalty Act ("AEDPA"), Congress enacted the "terrorism exception" to the FSIA, waiving the immunity of foreign states and their agents in any case

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency . . .

28 U.S.C. § 1605(a)(7). This provision only waives the immunity of a foreign state defendant that has been specifically designated by the State Department as a "state sponsor of terrorism," 28 U.S.C. § 1605(a)(7)(A), and does not apply if

> (i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or
>
> (ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

28 U.S.C. § 1605(a)(7)(B).

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Five months after the passage of AEDPA, Congress enacted a separate provision, titled *Civil Liability for Acts of State Sponsored Terrorism*, which created a private right of action against officials, employees, and agents of foreign states for the conduct described in § 1605(a)(7). *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Div. A, Title I, § 101(c) [Title V, § 589], 110 Stat. 3009-172 (codified at 28 U.S.C. § 1605 note). This provision is known as the "Flatow Amendment," in recognition of the family of Alisa Flatow, a woman who died as the result of a terrorist bombing in Israel. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 12 (D.D.C. 1998). The Flatow Amendment provides:

> (a) An official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 [section 2405(j) of the Appendix to Title 50, War and National Defense] while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code [subsec. (a)(7) of this section] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7) [subsec. (a)(7) of this section].

28 U.S.C. § 1605 note.

Appendix H

It is undisputed that the Flatow Amendment permits U.S. nationals to pursue a private right of action for terrorism against officials, employees, and agents of designated foreign states acting in their personal capacities. At issue here is whether section 1605(a)(7) and the Flatow Amendment similarly provide a cause of action against a *foreign state*.

C. The District Court's Judgment

The District Court assumed that plaintiffs' factual allegations were true, but denied both their motion to consolidate their case with Mr. and Mrs. Cicippio's case and their motion for summary judgment. The court also *sua sponte* dismissed the Cicippios' complaint under Federal Rules of Civil Procedure 12(b)(6) and 12(h)(3), concluding that "the FSIA, as amended, does not confer subject matter jurisdiction upon it to entertain claims for emotional distress and solatium brought by claimants situated as are these plaintiffs upon the allegations of their complaint." *Cicippio-Puleo*, Civ. No. 01-1496, slip op. at 2, App. 4. Noting that a foreign state is "liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 1606, the District Court held that the plaintiffs could not recover under the prevailing common law rule governing third party claims for outrageous conduct causing severe emotional distress. *Cicippio-Puleo*, Civ. No. 01-1496, slip op. at 3-4, App. 5-6. The District Court cited the Restatement (Second) of Torts for the proposition that a third party claimant must be present at the scene of the victim's torment in order to state a claim for intentional infliction of emotional distress. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 (1986)). The District Court also held that

solatium damages were unavailable to Mr. Cicippio's adult children and siblings, because "another generally observed rule of American common law has refused to recognize a right to recover damages for loss of 'society and companionship' by other than spouses for injury to a third party - even a relative - not resulting in third party's death." *Cicippio-Puleo*, Civ. No. 01-1496, slip op. at 4, App. 6.

As noted above, the District Court based its dismissal of the complaint on two grounds: Rule 12(b)(6) ("failure to state a claim upon which relief can be granted") and Rule 12(h)(3) ("the court lacks jurisdiction of the subject matter"). The second ground is inapposite, for it is clear that the District Court had jurisdiction pursuant to the statutory waiver of sovereign immunity under 28 U.S.C. § 1605(a)(7). Nonetheless, in their arguments to this court, the parties do not disagree that the principal basis for the District Court's dismissal was not a lack of jurisdiction, but, rather, plaintiffs' failure to state claims upon which relief could be granted. In other words, the parties do not disagree that the District Court's disposition embraces the conclusion that the plaintiffs cannot pursue their claims of emotional distress and loss of solatium against a foreign state under the Flatow Amendment. The Cicippios now appeal the District Court's dismissal of their claims.

D. The Appointment of *Amicus Curiae* and the Issues on Appeal

Because Iran has never entered an appearance in this litigation, the court appointed the Georgetown University Law Center's Appellate Litigation Program as *amicus curiae*

to present arguments in support of the District Court's judgment.*

The court also ordered the parties to brief and argue, *inter alia*, the following issues:

> " 'Whether the FSIA creates a federal cause of action for torture and hostage taking against foreign states,' or only against their 'official[s], employee[s] or agent[s]' as specified in the [Flatow] Amendment," an issue raised but not decided in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002).
>
> Whether Cicippio's children and siblings may sue for intentional infliction of emotional distress and loss of solatium.
>
> Whether appellants who seek to recover for emotional distress based on conduct directed at a third party must have been present at the time of the offending conduct, and, if so, whether appellants satisfied this "presence" requirement.

Cicippio-Puleo v. Islamic Republic of Iran, No. 02-7085 (D.C. Cir. July 9, 2003) (order appointing *amicus curiae*).

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* As they have done in the past, see *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 note * (D.C. Cir. 2003), the advocates from the Appellate Litigation Program responded admirably on very short notice in assisting the court with an outstanding brief and oral argument.

Subsequently, the court granted the motion of Blake Kilburn *et al.* ("Kilburn *amici*"), plaintiffs in other lawsuits in the district court against foreign states, for leave to participate as *amici curiae*. *Cicippio-Puleo v. Islamic Republic of Iran*, No. 02-7085 (D.C.Cir. July 31, 2003) (order granting motion for leave to participate as *amici curiae*).

E. The Appearance of the United States as *Amicus Curiae*

On November 6, 2003, the court issued the following order soliciting the views of the United States:

It is **ORDERED**, on the court's own motion, and in accordance with 28 U.S.C. § 517, that the United States of America file, by December 1, 2003, a statement of its current position on the question whether the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11 (2003), allows a cause of action for torture and hostage taking against foreign states, or only authorizes statutory claims against state officials, employees, or agents as specified in the Flatow Amendment, 28 U.S.C. § 1605 (note) (2000).

When the United States appeared in *Roeder v. Islamic Republic of Iran*, the Government submitted, *inter alia*,

> The Flatow Amendment does not provide a cause of action against foreign nations or their governments. . . . Quite unambiguously, the statute provides a cause of action against individual "official[s], employee[s], or agent[s]" of foreign states for the acts of terrorism in which they have taken part, but not against foreign states themselves.

Appendix H

The United States' Motion to Vacate Default Judgment and Dismiss Plaintiffs' Claims at 20-21, *Roeder v. Islamic Republic of Iran*, 195 F.Supp.2d 140 (D.D.C. 2002) (Civ. No. 00-3110 EGS). In a later submission in *Roeder*, the Government further submitted that,

> as the United States observed previously, the plain language of the Flatow Amendment provides the victims of terrorist acts a cause of action against the "official[s], employee[s] or agent[s] of a foreign state" who commit such acts, not against the foreign state itself.

Reply Memorandum in Support of the United States' Motion to Vacate Default Judgment and Dismiss Plaintiffs' Claims at 17, *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140 (D.D.C. 2002) (Civ. No. 00-3110 EGS).

The court hereby requests that the United States indicate whether the Government's position on the scope of the cause of action under the Flatow Amendment remains the same as indicated above, and, if not, explain how and why the position of the United States has changed.

Cicippio-Puleo v. Islamic Republic of Iran, No. 02-7085, 2003 WL 22669558 (D.C. Cir. Nov. 5, 2003) (order requesting statement of United States).

Appendix H

After receiving a two-day extension of time in which to submit its position, the United States filed a brief as *amicus curiae* on December 3, 2003, stating the firm view that the Flatow Amendment does not provide a private right of action against a foreign state:

> Neither *Section 1605(a)(7)* nor the Flatow Amendment, nor the two considered in tandem, offers any indication that Congress intended to take the more provocative step of creating a private right of action against foreign governments themselves. Such a move could have serious adverse consequences for the conduct of foreign relations by the Executive Branch, and therefore an intent to do so should not be inferred - it should be recognized only if Congress has acted clearly in that direction.

Br. for the United States as *Amicus Curiae* at 5.

II. ANALYSIS

A. Standard of Review

In denying plaintiffs' motion for summary judgment and in *sua sponte* dismissing their complaint pursuant to Rule 12(b)(6), the District Court assumed that plaintiffs' factual allegations were true. The standard of review covering both the denial of summary judgment and the dismissal for failure to state a claim is the same - *de novo*. *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1293 (D.C. Cir. 2002) (citing *Wilson v. Pena*, 79 F.3d 154, 160 n.1 (D.C. Cir. 1996)). And we may

affirm a district court's *sua sponte* dismissal for failure to state a claim if it appears beyond a doubt that the plaintiffs can prove no set of facts that would entitle them to relief. *See Baker v. Dir., United States Parole Comm'n*, 916 F.2d 725, 726 (D.C. Cir. 1990). Because we hold that the Flatow Amendment does not authorize a cause of action against foreign states, it is clear that plaintiffs can allege no facts in their lawsuit against Iran that would entitle them to relief under the Flatow Amendment. Therefore, we affirm the District Court's dismissal for failure to state a claim under section 1605(a)(7) and the Flatow Amendment.

B. The Limited Cause of Action under the Flatow Amendment

Section 1605(a)(7) waives the sovereign immunity of a designated "foreign state" in actions in which money damages are sought for personal injury or death caused by one of the specified acts of terrorism, if the act of terrorism or provision of material support is engaged in by "an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605(a)(7). Section 1605(a)(7) is merely a jurisdiction conferring provision that does not otherwise provide a cause of action against either a foreign state or its agents. However, the Flatow Amendment, 28 U.S.C. § 1605 note, undoubtedly does provide a cause of action against "[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism" "for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7)." The question here is whether the Flatow

Amendment, which does not refer to "foreign state," may be construed, either alone or in conjunction with section 1605(a)(7), to provide a cause of action against a foreign state.

This issue was flagged in *Price v. Socialist People's Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), where we observed that

> [t]he FSIA is undoubtedly a jurisdictional statute which, in specified cases, eliminates foreign sovereign immunity and opens the door to subject matter jurisdiction in the federal courts. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S. Ct. 2591, 2596-97, 77 L. Ed. 2d 46 (1983). There is a question, however, whether the FSIA creates a federal cause of action for torture and hostage taking *against foreign states.*

Id. at 87. Since *Price*, some district court opinions in this circuit have held or assumed that the Flatow Amendment creates a cause of action against foreign states. *See Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 231 (D.D.C. 2002) (holding that the Flatow Amendment provides a cause of action against a foreign state). *See also Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87, 98-99 (D.D.C. 2003) (adopting *Cronin*'s reasoning that there is a cause of action against foreign states under the Flatow Amendment); *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24, 36-37 (D.D.C. 2003) (same).

This court, however, has never affirmed a judgment that the Flatow Amendment, either alone or in conjunction with section 1605(a)(7), provides a cause of action against a foreign state. The issue was raised in *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 333 (D.C. Cir. 2003), but the appeal was resolved on other grounds. In *Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003), the court noted that, "[i]n view of the Flatow amendment's failure to mention the liability of foreign states, it is 'far from clear' that a plaintiff has a substantive claim against a foreign state under the Foreign Sovereign Immunities Act," *id.* at 234 n.3, but that appeal was also decided on other grounds.

We now hold that neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government. Section 1605(a)(7) merely waives the immunity of a foreign state without creating a cause of action against it, and the Flatow Amendment only provides a private right of action against officials, employees, and agents of a foreign state, not against the foreign state itself. Because we hold that there is no statutory cause of action against Iran under these provisions, we affirm the District Court's judgment without deciding whether the evidence presented by the plaintiffs is sufficient to recover for intentional infliction of emotional distress or loss of solatium.

* * * *

There is a clearly settled distinction in federal law between statutory provisions that waive sovereign immunity and those that create a cause of action. It cannot be assumed

that a claimant has a cause of action for damages against a government agency merely because there has been a waiver of sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 483-84, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). As the Supreme Court has noted:

> The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver, as in this case, the second inquiry comes into play-that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief.

Id. at 484, 114 S. Ct. 996.

The Supreme Court has also made it clear that the federal courts should be loathe to "imply" a cause of action from a jurisdictional provision that "creates no cause of action of its own force and effect . . . [and] imposes no liabilities." *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 577, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979). "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.* at 578, 99 S. Ct. 2479. In adhering to this view, the Supreme Court has declined to construe statutes to imply a cause of action where Congress has not expressly provided one. *See, e.g., Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) (recognizing the Court's retreat from its previous willingness to imply a cause of action where Congress has not provided one); *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)

("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.").

Unsurprisingly, the Supreme Court has applied the distinction between immunity and liability in interpreting the FSIA itself, explaining that "[t]he language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983). With this case law to guide us, there can be little doubt of the outcome in this case.

* * * *

The language of section 1605(a)(7) and the Flatow Amendment - the only provisions upon which plaintiffs rely - is clear. In declaring that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States . . . ," 28 U.S.C. § 1605(a)(7) merely abrogates the immunity of foreign states from the jurisdiction of the courts in lawsuits for damages for certain enumerated acts of terrorism. It does not impose liability or mention a cause of action. The statute thus confers subject matter jurisdiction on federal courts over such lawsuits, but does not create a private right of action.

As noted above, the Flatow Amendment imposes liability and creates a cause of action. But the liability imposed by the provision is precisely limited to "an official, employee, or agent of a foreign state designated as a state sponsor of

terrorism." "Foreign states" are not within the compass of the cause of action created by the Flatow Amendment. In short, there is absolutely nothing in section 1605(a)(7) or the Flatow Amendment that creates a cause of action against foreign states for the enumerated acts of terrorism.

We also agree with the United States that, insofar as the Flatow Amendment creates a private right of action against officials, employees, and agents of foreign states, the cause of action is limited to claims against those officials in their *individual*, as opposed to their official, capacities:

> As the Supreme Court repeatedly has explained, an *official*-capacity claim against a government official is in substance a claim against the government itself. See, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). . . . By definition, a damages judgment in an official-capacity suit is enforceable against the state itself (and only against the state). See *Graham*, 473 U.S. at 166, 105 S.Ct. 3099 . . . ; see also Fed. R. Civ. P. 25(d). . . . Thus, to construe the Flatow Amendment as permitting official-capacity claims would eviscerate the recognized distinction between suits against governments and suits against individual government officials. . . . [T]he text of the the Flatow Amendment and Section 1605(a)(7), as well as all relevant background interpretive principles . . . foreclose any such construction.

Br. for the United States as *Amicus Curiae* at 17.

* * * *

Appendix H

The plaintiffs and *amicus curiae* dispute both the meaning and relevance of the legislative history of the FSIA or the Flatow Amendment in support of their competing arguments to the court. The legislative history is largely irrelevant, however, because the statutory language is clear - nothing in section 1605(a)(7) or the Flatow Amendment establishes a cause of action against *foreign states*. And, as we explain below, there is nothing in the legislative history that raises any serious doubts about the meaning of the statute.

In 1976, the House Judiciary Committee Report explained that the FSIA was "not intended to affect the substantive law of liability." H.R. Rep. No. 94-1487, at 12 (1976). It stated that the statute was intended to preempt other federal or state law that accorded sovereign immunity, and to discontinue the practice of judicial deference to suggestions of immunity from the executive branch. *Id.* But the statute was not intended to affect "the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued; or whether an entity sued is liable in whole or in part for the claimed wrong." *Id.*

When Congress passed *section 1605(a)(7)*, the Conference Committee report explained:

> This subtitle provides that nations designated as state sponsors of terrorism under section 6(j) of the Export Administration Act of 1979 will be amenable to suit in U.S. courts for terrorist acts. It permits U.S. federal courts to hear claims seeking money damages for personal injury or

> death against such nations and arising from terrorist acts they commit, or direct to be committed, against American citizens or nationals outside of the foreign state's territory, and for such acts within the state's territory if the state involved has refused to arbitrate the claim.

H.R. Conf. Rep. No. 104-518, at 112 (1996). It is noteworthy that the legislative history does not say that section 1605(a)(7) imposes liability against foreign states or create a cause of action against them.

When Congress later passed the appropriations bill that included the Flatow Amendment, there was very little legislative history purporting to explain the enactment. The Conference Report said: "The conference agreement inserts language expanding the scope of monetary damage awards available to American victims of international terrorism. The conferees intend that this section shall apply to cases pending upon enactment of this Act." H.R. Conf. Rep. No. 104-863, at 987 (1996). As the United States notes in its brief, "[o]n its face, that statement addresses only issues of damages and retroactivity, not the question whether foreign states are proper defendants in the first place." Br. for the United States as *Amicus Curiae* at 12. We agree. Thus, the legislative history of the Flatow Amendment is not inconsistent with the clear terms of the statute.

Subsequent enactments by Congress providing for the payment or enforcement of judgments entered against foreign states in cases brought under § 1605(a)(7) fail to establish that Congress created a cause of action against foreign states.

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See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541-43; Terrorism Risk Insurance Act of 2002, Pub.L. No. 107-297, § 201, 116 Stat. 2322, 2337- 39. As we explained in *Roeder*, these statutes merely provide for payment "if an individual has a judgment against Iran," but they do not address or resolve the anterior question "whether plaintiffs are legally entitled to such a judgment." 333 F.3d at 239 (emphasis added). It is entirely plausible for Congress to direct the United States to compensate victims of terrorism without purporting to establish or support a cause of action against foreign state sponsors of terrorism.

* * * *

There is nothing anomalous in Congress's approach in enacting the Flatow Amendment. As we noted in *Price*, the passage of § 1605(a)(7) involved a delicate legislative compromise. While Congress sought to create a judicial forum for the compensation of victims and the punishment of terrorist states, it proceeded with caution, in part due to executive branch officials' concern that other nations would respond by subjecting the American government to suits in foreign countries. *See Price*, 294 F.3d at 89 (citing John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 35-37 (1999)).

The plaintiffs suggest that our construction of the Flatow Amendment "w[ill] mean that what Congress gave with one hand in section 1605(a)(7) it immediately took away with the other in the Flatow Amendment." *See Cronin*, 238

F. Supp. 2d at 232. We disagree. Section 1605(a)(7) does not purport to grant victims of terrorism a cause of action against foreign states, or against officials, employees, or agents of those states acting in either their official or personal capacities. Therefore, the Flatow Amendment's authorization of a limited cause of action against officials, employees, and agents acting in their personal capacities takes nothing away from § 1605(a)(7). What § 1605(a)(7) does is to make it clear that designated foreign state sponsors of terrorism will be amenable to suits in United States courts for acts of terrorism in cases in which there is a viable cause of action.

Clearly, Congress's authorization of a cause of action against officials, employees, and agents of a foreign state was a significant step toward providing a judicial forum for the compensation of terrorism victims. Recognizing a federal cause of action against foreign states undoubtedly would be an even greater step toward that end, but it is a step that Congress has yet to take. And it is for Congress, not the courts, to decide whether a cause of action should lie against foreign states. Therefore, we decline to imply a cause of action against foreign states when Congress has not expressly recognized one in the language of section 1605(a)(7) or the Flatow Amendment.

* * * *

Although we affirm the District Court's dismissal of plaintiffs' complaint for failure to state a claim under section 1605(a)(7) and the Flatow Amendment, we will nonetheless remand the case. The Cicippios' suit was filed in the wake of judgments in favor of Mr. and Mrs. Cicippio and other

hostage victims, so they may have been misled in assuming that the Flatow Amendment afforded a cause of action against foreign state sponsors of terrorism. We will therefore remand the case to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law, including state law, as the Kilburn *amici* have suggested.

In remanding, we do not mean to suggest, one way or the other, whether plaintiffs have a viable cause of action. The possibility that an alternative source of law might support such a claim was addressed only by *amici*, and we do not ordinarily decide issues not raised by parties. *See, e.g.*, *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998). Accordingly, we will leave it to the District Court in the first instance to address any amended complaint that is offered by plaintiffs.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the District Court dismissing plaintiffs' complaint for failure to state a claim upon which relief can be granted, and remand the case for further proceedings consistent with this opinion.

APPENDIX I — EXCERPTS FROM H.R. REP. NO. 103-702 (1994)

FOREIGN SOVEREIGN IMMUNITIES AMENDMENTS

AUGUST 16, 1994.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 934]

[Including coat estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 934) to amend title 28, United States Code, relating to jurisdictional immunities of foreign states, to grant jurisdiction to the courts of the United States in certain cases involving torture or extrajudicial killing occurring in that state, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

Appendix I

The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following.

SECTION 1. EXCEPTION TO FOREIGN SOVEREIGN IMMUNITY FOR CERTAIN CASES INVOLVING TORTURE, EXTRAJUDICIAL KILLING, OR GENOCIDE IN A FOREIGN STATE.

Section 1605(a) of title 28, United States Code, is amended

(1) by striking "or" at the end of paragraph (5);

(2) by striking the period at the end of paragraph (6) and inserting in lieu thereof "; or;" and

(3) by adding at the end thereof the following:

"(7) not otherwise encompassed in paragraph (2), in which money damages are sought against a foreign state for the personal injury or death of a United States citizen occurring in such foreign state and caused by the torture or extrajudicial killing of that citizen, or by an act of genocide committed against that citizen, by such foreign state or by any official or employee of such foreign state while acting within the scope of his or her office or employment, except that—

"(A) an action under this paragraph shall not be maintained unless the individual whose injury

or death gave rise to the action was a United States citizen at the time the conduct causing such injury or death occurred;

"(B) the court shall decline to hear a claim under this paragraph if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred; and

"(C) an action under this paragraph shall not be maintained unless—

"(i) the action is commenced within 10 years after the cause of action accrues; or

"(ii) the cause of action is based on an act of genocide occurring more than 10 years before the date of the enactment of this paragraph and the action is brought within 18 months after such date of enactment.

For purposes of paragraph (7), the terms 'torture' and 'extrajudicial killing' have the meanings given those terms in section 3 of the Torture Victim Protection Act of 1991, and the term 'act of genocide' means conduct that would be a violation of section 1091 of title 18 if committed in the United States."

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SEC. 2. EXCEPTION TO IMMUNITY FROM ATTACHMENT.

(a) FOREIGN STATE.—Section 1610(a) of title 28, United States Code, is amended—

(1) by striking the period at the end of paragraph (6) and inserting in lieu thereof", or"; and

(2) by adding at the end thereof the following new paragraph:

"(7) the judgment relates to a claim for which the foreign state is not immune by virtue of section 1605(a)(7) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based".

(b) AGENCY OR INSTRUMENTALITY.—Section 1610(b)(2) of such title is amended—

(1) by striking "or (5)" and inserting in lieu thereof "(5), or (7)"; and

(2) by striking "used for the activity" and inserting in lieu thereof "involved in the act".

SEC. 3. APPLICABILITY.

The amendments made by this Act shall apply to any cause of action arising before, on, or after the date of the enactment of this Act.

Amend the title so as to read:

A bill to amend title 28, United States Code, relating to jurisdictional immunities of foreign states, to grant jurisdiction to the courts of the United States in certain cases involving torture, extrajudicial killing, or genocide occurring in that state.

EXPLANATION OF AMENDMENT

Inasmuch as H.R. 934 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

SUMMARY AND PURPOSE

The purpose of H.R. 934 is to allow U.S. citizens who have been subjected to torture, genocide, or extrajudicial killing by foreign government officials to maintain a Federal cause of action for damages against the foreign government involved.

* * *

Appendix I

DISSENTING VIEWS

We oppose this bill and urge its defeat. This legislation (H.R. 934) would amend the Foreign Sovereign Immunities Act of 1976 to allow U.S. citizens who are the victims or family members of victims of torture, extrajudicial killing, or genocide committed abroad by foreign governments to sue those governments in U.S. courts for those acts. We believe that such an amendment would lead other countries to amend their laws in ways that would subject the interests of the United States Government and our citizens to substantial risk. While we are sympathetic to the intent behind the bill, we believe that amending the Foreign Sovereign Immunities Act is an inappropriate way to accomplish this intent.

Sovereign immunity is a long-recognized legal theory under which sovereign nations, or governments, may not be sued without their consent. Under this doctrine sovereign nations are generally immune from lawsuits brought in the courts of other nations. The Foreign Sovereign Immunities Act codifies this doctrine. The Act also provides for several exceptions to the doctrine by granting U.S. courts jurisdiction over foreign governments in certain situations. One of the most significant of these exceptions allows U.S. citizens to sue foreign governments when those governments are acting in a business or commercial capacity and when that business or commercial activity occurs in the United States or has a direct effect in the United States. Another exception allows foreign governments to be sued for certain torts committed in the United States.

These exceptions to the doctrine have developed in this century as the result of increasing involvement by governments in commercial activities in foreign countries. The United States first adopted what is now known as the "restrictive theory" of sovereign immunity in the 1950s, later codifying it in 1976 in the Foreign Sovereign Immunities Act. Under the present version of the Act, foreign governments may be sued in U.S. courts with respect to—

Commercial activities conducted in this country;

Acts in this country connected to commercial activities elsewhere;

Acts that occur in a foreign country when the action is based on commercial activity in a foreign country that causes a direct effect in this country; and

Certain torts that occur in the United States.

In each of these cases, in order for an American citizen to bring suit against the foreign sovereign, the acts giving rise to the claim must have occurred in the United States, be connected with a commercial activity occurring in the United States, or have had a direct effect within the U.S.

By contrast, H.R. 934, as amended, would allow suits against foreign states in U.S. courts for actions that occurred entirely within the foreign country, and that occurred while the foreign state was acting in a governmental capacity. As such, the bill would substantially alter the purpose and scope of the Foreign Sovereign Immunities Act and would

be a fundamental departure from the international legal theory upon which the Act is based. We are unaware of any other country which grants its citizens the right to sue a foreign government for acts that the foreign government committed outside the citizen's home country.

Although the language of H.R. 934 is similar to the Torture Victim Protection Act of 1991, which became law in 1992, there are significant differences. First, it amends the Foreign Sovereign Immunities Act, which the Torture Victim Protection Act did not. Second, and more importantly, the cause of action given to U.S. citizens under the Torture Victim Protection Act is against the foreign officials who tortured that citizen and who have subsequently entered the U.S. (thus becoming subject to the personal jurisdiction of the U.S. courts). H.R. 934 provides a cause of action in U.S. courts against a foreign *government* that allegedly engaged in the torture or extrajudicial killing of; or act of genocide against, a U.S. citizen in that foreign state. As such, the bill represents a significant departure from the internationally-accepted doctrine of sovereign immunity.

On June 21, 1994, representatives of the State and Justice Departments testified before the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee with respect to S. 825, a bill which would enable U.S. citizens to sue foreign governments in U.S. courts for damages resulting from acts of terrorism committed outside the United States by those governments. The State Department stated its opposition to that bill. The Justice Department went on record as deferring to the views of the State Department with respect to the bill. One of the State

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Department objections to the bill, noted in their testimony by representatives of both the State and Justice Departments, was the risk that passage of the bill would lead other countries to modify their laws relating to foreign sovereign immunity, and possibly modify them in ways not limited to torture, with the result being that the United States could be sued in foreign courts for acts which the U.S. Government might take in the United States against foreign nationals. Representatives of the State and Justice Departments during the Bush Administration, citing these same concerns, also testified in opposition to a prior version of H.R. 934 introduced in the 102d Congress. We believe that it is significant that State and Justice Department officials in both Democratic and Republican administrations view the changes that H.R. 934 would make to be poor public policy.

The risk to American assets abroad would be significant should other countries respond to the passage of H.R. 934 by enacting further exceptions to their foreign sovereign immunity laws which are broader in scope that is H.R. 934. We agree with the views of both the Clinton and Bush Administration representatives that this is a significant possibility should H.R 934 become law.

Appendix I

Simply stated, the risks that other nations will greatly expand their exception to the doctrine of foreign sovereign immunity should H.R. 934 become law are greater than the benefit to the few individuals who would be helped by it. In light of these risks we oppose the bill. We urge our colleagues to oppose it as well.

BILL MCCOLLUM.
HAMILTON FISH, Jr.
CARLOS J. MOORHEAD.
HENRY J. HYDE.
F. JAMES SENSENBRENNER, Jr.
GEORGE W. GEKAS.
HOWARD COBLE.
LAMAR S. SMITH.
STEVE SCHIFF.
JIM RAMSTAD.
ELTON GALLEGLY.
CHARLES T. CANADY.
BOB INGLIS.
ROBERT W. GOODLATTE.

* * * *

APPENDIX J — EXCERPT FROM H.R. REP. NO. 104-383 (1995)

* * *

AMENDING THE FOREIGN SOVEREIGN IMMUNITIES ACT

Also responding to the tragedy of the Pan Am 103 bombing is section 804, which would amend the Foreign Sovereign Immunities Act (28 U.S.C. §§ 1602, *et seq.*) to permit suits by U.S. nationals against foreign states in U.S. courts. Jurisdiction would be granted to such suits seeking money damages for personal injury or wrongful death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or providing material support or resources for such acts. The lawsuit must allege that the terrorist act was undertaken by an "official, employee or agent" of a foreign country, or acting on behalf of, or at the insistence of, a foreign country's leadership or hierarchy. It is expected that a lawsuit proceeding under this section will be brought either by the victim, or on behalf of the victim's estate in the case of death or mental incapacity.

The existence of state-sponsored terrorism is well documented and state sponsors of terrorism include Libya, Iraq, Iran, Syria, North Korea, Cuba, and Sudan. These outlaw states consider terrorism a legitimate instrument of achieving their foreign policy goals. They have become better at hiding their material support for their surrogates, which includes the provision of safe havens, funding, training, supplying weaponry, medical assistance, false travel documentation, and the like. For this reason, the Committee has determined that allowing suits in the federal courts against countries responsible for terrorist acts where Americans and/or their

loved ones suffer injury or death at the hands of the terrorist states is warranted. Section 804 will give American citizens an important economic and financial weapon against these outlaw states.

* * * *

APPENDIX K — EXCERPT FROM 139 CONG. REC. S4924 (1993) (STATEMENT OF SENATOR SPECTER)

* * *

By Mr. **SPECTER:**

S. 825. A bill to amend title 28 of the United States Code to permit a foreign state to be subject to the jurisdiction of Federal or State courts in any case involving an act of international terrorism; to the Committee on the Judiciary.

FOREIGN SOVEREIGN IMMUNITIES AMENDMENTS ACT

Mr. **SPECTER.**

Mr. President, from 1984 to late in 1991, American citizens were held hostage in Lebanon by terrorist groups sponsored and funded by the Government of Iran. Since their release, many of these former hostages have continued to suffer from the physical and emotional trauma that their periods in captivity thrust upon them. Were a similar situation to occur in this country, the injured party would have access to the judicial system to seek redress in the form of monetary damages in addition to any criminal kidnaping charges. Because the perpetrator behind these acts of terrorism in Lebanon was a foreign government, however, the aggrieved parties cannot seek redress in American courts because of the immunity granted to foreign nations under the Foreign Sovereign Immunities Act. To remedy this travesty for future victims, I am today introducing legislation to amend the Foreign Sovereign Immunities Act.

Appendix K

Since 1980, more than 6,500 international terrorist incidents have occurred worldwide, leaving more than 5,100 people dead and 12,500 wounded. About 2,500 attacks were against American targets. As of May 1992, American casualties since 1980 have totaled 587 dead and 627 wounded.

Of particular concern and notoriety was the taking of American hostages in Lebanon. On September 12, 1986, Joseph James Cicippio, of Norristown, PA, deputy comptroller of the American University of Beirut, was kidnaped by some group self-styled the Revolutionary Justice Organization. He was held until December 2, 1991, when, in the span of a few remarkable days, the ordeal of the American hostages ended with the release of the last three hostages, Mr. Cicippio, Alann Steen, and Terry Anderson.

Ended, however, is a relative term, for the ordeal is still not really over for the former hostages. Released hostages reported that they were tortured by their captors. The torture took many forms. Hostages report that they were beaten, starved, chained and bound, exposed to the elements, blindfolded, taunted, subjected to threatened executions, and denied medical and hygiene facilities. Some former captives still suffer from the pain of numerous beatings, especially to their feet. Alann Steen is reported to suffer still from beating-related seizures. Lost time with friends and families cannot be replaced: Terry Anderson's daughter was born and had turned 4 before he was released from captivity; Joseph Cicippio's older sister, and his son, Joseph Jr., died while he was held hostage. The pain of their ordeals may never end; the suffering in their hearts may never cease.

Appendix K

What exacerbates any feeling of antipathy is the knowledge that a foreign government provided the support, both politically and financially, for the captors to keep their victims. Hezbollah, the umbrella organization for many militant Shia Moslem terrorist groups in Lebanon, including the Revolutionary Justice Organization, closely collaborates with the leadership in Iran. The collaboration is reflected in the financial support which it receives from Iran. It is reported that Iran spent $30 million during 1985 and more than $64 million during 1987 in Lebanon, mainly in the form of donations to Hezbollah. Iran's control over the hostage takers remain unclear, but Government officials have estimated that their control ranged from general to complete. Regardless, Iran's role in the taking and keeping of American hostages underscores the need for this legislation, because under the Foreign Sovereign Immunities Act as it now stands, the former hostages are probably precluded from successfully pursuing legal action against Iran or any other foreign sovereign for sponsoring terrorist activity.

This legislation would amend the Foreign Sovereign Immunities Act by giving Federal courts jurisdiction over any suit brought in this country against any foreign country that has been formally listed by the State Department as a supporter of international terrorism, if that foreign state has committed, caused, or supported an act of terrorism against an American citizen. The legislation would also enable the court to freeze all assets of the defendant country located within the United States sufficient to satisfy a judgment. The bill also provides for a 6-year statute of limitations.

Appendix K

This legislation is important for several reasons. It would further the U.S. policy of opposing domestic and international terrorism and would demonstrate to the world that the United States and its people are prepared to act to combat and respond to terrorist acts. It also reinforces our commitment to the rule of law, and in so doing makes clear the contrast between our Nation which abides by the principles of international law and outlaw nations such as Iran, which do not.

This legislation would let foreign sovereigns know that states which practice terrorism or actively support it will not do so without consequence. When there is ample evidence that a foreign state supports terrorism so that the State Department has placed that nation on a list of nations that sponsor terrorism, this legislation will allow U.S. citizens, acting according to lawful process in our courts, to protect their interests and seek compensation for the harm done to them.

State-sponsored terrorism has become a hallmark of certain regimes seeking to influence the political decisions made by the elected representatives of the people in our democracy. None of these nations that actively support state-sponsored terrorism is itself democratic. Countries such as Libya, Iran, Cuba, North Korea, and Iraq will be less likely to support terrorism directed against the citizens of this country when they know that their actions will lead to damages paid to the victims of their terrorism who are United States citizens.

Appendix K

Iran reportedly paid $1 to $2 million for each hostage released to the various fundamentalist groups under its control, after paying for the upkeep and confinement of those hostages. This money would be better spent aiding the former hostages assimilate back into their lives and would create a real, measurable cost to Iran for supporting their captivity.

This amendment would also provide additional incentive to other nations to comply with the principles of international law, which condemn terrorism and attacks on innocent citizens of another nation. When a nation's refusal to comply with international law leads to compensation to the victims of its actions, those nations that violate international law will see it as more practical, and beneficial, to change their policies. As demonstrated by the success of combating terrorism during the height of the gulf war when the international community agreed to work together to prevent terrorism, much can be accomplished. Supporting this legislation will allow Americans to play a role in enforcing international law by giving them redress against those nations that actively violate international law.

United States counterterrorism policy is based on three principles: first, the United States makes no concessions to terrorists holding official or private American citizens hostage; second, the United States cooperates with friendly countries in developing practical measures to counter terrorism; and third, the United States works with other countries to put pressure on terrorist-supporting states to persuade them that such support is not free. While these principles serve the policy of the U.S. Government, they do little to address the concerns of individuals who have been

the victims of international terrorism. In order to address the individual problems and results of terrorism, individuals must be able to seek redress for themselves. U.S. law should aid American citizens in this pursuit, not hinder them. Supporting this legislation would serve the purpose of aiding American citizens, while supporting America's counterterrorism goals.

I note finally that the purpose of the Foreign Sovereign Immunities Act was to shield foreign nations, as opposed to foreign nationals, from the jurisdiction of American courts for sovereign acts. This is a salutary policy that promotes the pursuit of American foreign policy interests and goals. I have no desire to attack this policy protecting foreign nations from suit. This legislation is very narrowly crafted to create a slight breach in the immunity enjoyed by foreign governments. Only those nations formally recognized by the State Department as active supporters of state-sponsored terrorism could be sued. Thus, this legislation should have no effect on the ability of the President and officers of the executive to control U.S. foreign policy. While I understand the possible reluctance to open the door to suing foreign nations at all, I believe that the circumstances here are compelling. Terrorism violates all principles of international law. If a nation is formally recognized by the U.S. Government as a sponsor of terrorism, there can be no valid argument allowing that nation to retain its immunity under American law for the harm committed in pursuit of its terrorist policies.

I ask unanimous consent that a copy of my legislation be printed in the RECORD.

* * * *

APPENDIX L — EXCERPT FROM 142 CONG. REC. H2141-42 (1996) (STATEMENT OF CONGRESSMAN FOX)

MARCH 13, 1996 CONGRESSIONAL RECORD — HOUSE H2141

* * *

Mr. Chairman, I yield 11/2 minutes to the learned gentleman from Pennsylvania. [Mr. Fox].

Mr. Fox of Pennsylvania. Mr. Chairman. I rise in support of the foreign sovereign immunity amendments contained in this legislation. We must make foreign state sponsors of terrorism responsible for their actions. Recent events make clear now more than ever the grave threat posed by international terrorism to the interests of the United States at home and abroad. Outlaw states continue to serve as sponsors and promoters of this reprehensible activity, providing safe haven, training, weapons, and other support to terrorists.

Terrorists are responsible for the deaths of our citizens and other innocent civilians in senseless acts of violence and the destruction of property throughout the world. You will recall, with horror and profound grief, the murders aboard the Achille Lauro cruise liner, the bombing of Pan AM Flight 103, the World Trade Center bombing and the four recent bombings in the State of Israel. The list of other such shameful and cowardly acts is endless.

In addition to the horrible human and economic costs of terrorism, it is also a serious attack on United States foreign policy across the globe. Terrorist acts create instability, detract from our efforts to secure peace, and directly assault the United States and our closest allies.

Appendix L

We cannot tolerate support for terrorism from foreign governments. No member of the community of nations should condone or assist such reprehensible violence. And no foreign state should be able to hide behind its immunity as a sovereign government to avoid having to pay the consequences of supporting terrorism. Accordingly, I introduced H.R. 1877, the State-Sponsored Terrorism Responsibility Act to allow American victims to have a means of redress in the courts. I am pleased to see that under Chairman HYDE's leadership, this measure has been included in the legislation before us today.

We must make a clear statement that support for terrorism is unacceptable in the international community. Allowing lawsuits against nations which aid terrorists will allow us to increase the pressure against these outlaw states which would deprive our citizens, our Nation, and our allies of their freedom and safety.

* * * *

APPENDIX M — EXCERPT FROM 142 CONG. REC. H2132 (1996) (STATEMENT OF CONGRESSWOMAN ROS-LEHTINEN)

* * *

Mr. Speaker, the past several decades have taught us a great deal about international terrorism. We know that, to function in the international arena, these criminals require state sponsorship. As our colleague, Representative TOM LANTOS, has stated:

> Terrorists do not operate in a vacuum, but rather rely on certain nations where they know they will find safe haven after carrying out their murderous acts. They must have at least tacit governmental approval of planned operations and millions with which to continue to buy the tools of death and destruction.

The physical evidence recovered from the wreckage demonstrated the truth of that observation. The explosive was identified: it turned out to be an exotic plastic explosive, an explosive formulated to evade detection by conventional airport security. The electronics were similarly specialized and while helping to solve the crime, did not bring justice.

When this forensic evidence identified the regime of Libyan dictator Mùammar Qadhafi as responsible for this crime, diplomatic pressure has been applied in an effort to force the extradition of these murders. Qadhafi has refused to surrender them for trial in either the United Kingdom or the United States.

Appendix M

To avoid civil action, the regime has hidden behind the Foreign Sovereign Immunities Act of 1976. This is the classic situation of a criminal regime invoking the protection of the law while acting in contempt of it. This bill contains a provision that will, under the narrow circumstances of terror and genocide, allow victims to reach beyond the Foreign Sovereign Immunities Act to seek redress for these crimes from the governments that sponsor these atrocities.

* * * *

APPENDIX N — EXCERPT FROM 142 CONG. REC. H2185 (1996) (STATEMENT OF CONGRESSMAN HYDE)

* * *

Mr. HYDE. Mr. Chairman, the gentleman is moving to strike the enacting clause and to kill this legislation. I know that would please him and it certainly would not disappoint the gentleman from Michigan, but I think it would disappoint a lot of people, such as the families of the victims at Oklahoma City whom I have met, such as the families of the victims of pan Am 103 whom I have met, such as the hostages who returned from Lebanon who were here the other day, such as the daughter of Leon Klinghoffer, who was murdered by thugs on the *Achille Lauro.* These are people who would like to see us pass this legislation.

You may think there is nothing left, but there is substantial good left in the bill, despite the Barr amendment which I deplore. One of the things left is the ability of the victims' families to sue terrorist countries and perpetrators of terrorist acts in this country and get a judgment, because some of their assets are here have been frozen. So that alone makes this worthwhile.

* * * *

(5)

Supreme Court, U.S.
FILED
MAR 2 1 2005
OFFICE OF THE CLERK

No. 04-820

In the Supreme Court of the United States

CLIFFORD ACREE, ET AL., PETITIONERS

v.

REPUBLIC OF IRAQ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was deprived of subject-matter jurisdiction over this suit two months prior to the entry of judgment when the President, in exercise of authority granted him in Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, 117 Stat. 579, determined that the statutory provision that serves as the sole basis for the court's subject-matter jurisdiction, 28 U.S.C. 1605(a)(7), should be made inapplicable to Iraq in light of the fundamental transformation in the United States' relations with that country after the removal of the Hussein regime by military force.

2. Whether the court of appeals correctly determined that neither "generic common law" nor the Flatow Act, which creates a cause of action against foreign governmental officials, provides a basis for asserting liability against a foreign state in a suit brought under the Foreign Sovereign Immunities Act.

3. Whether the court of appeals erred in declining to remand the case to the district court to allow petitioners a further opportunity to specify a provision of state or foreign law as the source of their common law claims.

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In the Supreme Court of the United States

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CLIFFORD ACREE, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 370 F.3d 41. The opinions of the district court (Pet. App. 51a-63a, 64a-162a) are reported at 276 F. Supp. 2d 95 and 271 F. Supp. 2d 179.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2004. A petition for rehearing was denied on August 19, 2004 (Pet. App. 164a-165a). On November 4, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 17, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, establishes a general rule that

"a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. 1604, subject only to exceptions specifically enumerated in 28 U.S.C. 1605 (2000 & Supp. I 2001) and 28 U.S.C. 1607. The FSIA gives the federal district courts jurisdiction over a civil action against a foreign state if, but only if, one of those immunity exceptions is applicable. 28 U.S.C. 1330(a). The FSIA prohibits the entry of a default judgment against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. 1608(e). Thus, the FSIA imposes on the court an independent "obligation to satisfy itself that plaintiffs have established a right to relief." *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 232 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 2836 (2004).

In 1996, Congress amended the FSIA to restrict the sovereign immunity of any foreign country "designated as a state sponsor of terrorism" under the Export Administration Act of 1979, 50 U.S.C. App. 2401 *et seq.*, or the Foreign Assistance Act of 1961, 22 U.S.C. 2151 *et seq.* See 28 U.S.C. 1605(a)(7)(A).[1] As relevant here, Section 1605(a)(7) abrogates the sovereign immunity of a designated foreign state in cases involving claims for money damages for personal injury or death caused by "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources * * * for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." *Ibid.* Several months after adopting the immunity exception for acts of state-sponsored terrorism, Congress enacted a provision

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[1] All references to 28 U.S.C. 1605(a)(7) and (a)(7)(A) are to the 2001 Supplement to the United States Code.

entitled Civil Liability for Acts of State Sponsored Terrorism. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, Tit. I, § 101(c) [Tit. V, § 589], 110 Stat. 3009-172 (28 U.S.C. 1605 note). That provision, sometimes referred to as the "Flatow Act,"[2] provides in relevant part that "an official, employee, or agent of a foreign state designated as a state sponsor of terrorism * * * while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [28 U.S.C. 1605(a)(7)] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7)."

2. On September 13, 1990, the Secretary of State designated Iraq as a state sponsor of terrorism under the Export Administration Act. 55 Fed. Reg. 37,793. As a result, Iraq under Saddam Hussein's regime was subjected to a wide range of legal and economic sanctions, including denial of visas to Iraqi nationals (8 U.S.C. 1735 (Supp. II 2002)), loss of Department of Defense assistance (10 U.S.C. 2249a(a)), loss of military contracts (10 U.S.C. 2327(b)), loss of grants and fellowships to Iraqi nationals (15 U.S.C. 7410(b) (2000 & Supp. II 2002)), denial of tariff preferences (19 U.S.C. 2462(b)(2)(F)), loss of foreign aid (22 U.S.C. 2371(a)), loss of foreign tax credits (26 U.S.C. 901(j)(2)(A)(iv)), and restrictions on United States exports (50 U.S.C. App. 2405(j)). After enactment of the FSIA's terrorism exception in 1996, the

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[2] Petitioners (and many courts) refer to the Flatow Act as the Flatow "Amendment," which may create the incorrect impression that Congress enacted the provision as an amendment to the FSIA. The Act does not, however, amend any law. See 110 Stat. 3009-172.

1990 designation of Iraq as a state sponsor of terrorism also had the effect of abrogating Iraq's immunity from claims within the scope of Section 1605(a)(7). See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(c), 110 Stat. 1243 (Section 1605(a)(7) applies to "any cause of action arising before, on, or after the date of the enactment of this Act").

3. On March 19, 2003, a United States-led coalition began military operations to disarm Iraq and remove Hussein's regime from power. The coalition has achieved that objective: Baghdad was liberated on April 9, 2003; major combat operations against the Iraqi army ended on May 1, 2003; and Hussein himself was captured on December 13, 2003.

In response to the dramatically changed circumstances in Iraq resulting from the removal of the Hussein regime, Congress and the President took various steps to stabilize Iraq and reconstruct it as quickly as possible. On April 16, 2003, Congress enacted the Emergency Wartime Supplemental Appropriations Act of 2003 (EWSAA), Pub. L. No. 108-11, 117 Stat. 559. Section 1503 of EWSAA authorized the President, *inter alia*, to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 * * * or any other provision of law that applies to countries that have supported terrorism." 117 Stat. 579. On May 7, 2003, the President exercised the full extent of that authority by issuing Presidential Determination 2003-23, which "ma[d]e inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 and any other provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. 26,459 (citation omitted).

In a formal message to Congress, the President specified that the provisions of law that had been made inapplicable to Iraq by Section 1503 and Presidential Determination 2003-23 "include, but are not limited to, 28 U.S.C. 1605(a)(7), 28

U.S.C. 1610, and section 201 of the Terrorism Risk Insurance Act [of 2002]" (TRIA), Pub. L. No. 107-297, 116 Stat. 2337, relating to the enforcement of terrorism-related judgments. *Message to the Congress Reporting the Declaration of a National Emergency with Respect to the Development Fund for Iraq*, 39 Weekly Comp. Pres. Doc. 21, at 647-648 (May 22, 2003). The President's message, which also informed Congress that he had issued Executive Order 13,303 to protect Iraqi assets from "attachment or other judicial process," stated that "[a] major national security and foreign policy goal of the United States" in the wake of the successful military campaign was "to ensure that * * * Iraqi resources * * * are dedicated for the well-being of the Iraqi people, for the orderly reconstruction and repair of Iraq's infrastructure * * * and for other purposes benefiting the people of Iraq." *Id.* at 647; 68 Fed. Reg. 31,931-31,932 (2003).[3] The President stated that the "threat of attachment or other judicial process" against these Iraqi assets, and concomitant threat to the reconstruction of Iraq, constituted an "extraordinary threat * * * to the national security and foreign policy of the United States." 39 Weekly Comp. Pres. Doc. 21, *supra*, at 647.

On October 20, 2004, the Secretary of State rescinded the 1990 designation of Iraq as a state sponsor of terrorism. 69 Fed. Reg. 61,702. The Secretary explained that the rescission was "of symbolic importance" for strengthening "the partnership of the Untied States and Iraq" even though "nearly all the restrictions applicable to countries that have supported terrorism, including the application of 2[8] U.S.C. 1605(a)(7), were made inapplicable with respect to Iraq permanently in Presidential Directive No. 2003-23." *Ibid.*

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[3] Executive Order No. 13,303, 3 C.F.R. 227 (2004), was issued pursuant to the President's authority under the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* See 68 Fed. Reg. at 31,931.

4. Petitioners are 17 present and former American service members who were captured and held by the Hussein regime as prisoners of war (POWs) during the 1991 Gulf War, eight of their spouses, and 29 of their children, parents, and siblings. In April 2002, petitioners filed this suit against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his official capacity, for injuries to the POWs and their families that resulted from mistreatment of the POWs by Iraq. Petitioners invoked the district court's jurisdiction under 28 U.S.C. 1330 and 1605(a)(7). Their complaint asserted causes of action under Section 1605(a)(7) and the "traditional torts of assault, battery and intentional infliction of emotional distress." C.A. App. 143. In subsequent district court filings, petitioners identified two other asserted causes of action, one arising directly under the Flatow Act, Pet. App. 184a, and the other arising indirectly under the Flatow Act through application of the principle of respondeat superior, *id.* at 192a.

On July 7, 2003, two months after Presidential Determination 2003-23 had rendered Section 1605(a)(7) inapplicable to Iraq, the district court entered a default judgment in favor of petitioners. Pet. App. 64a. Without discussing the Presidential Determination, the district court concluded that it had subject-matter jurisdiction under Section 1605(a)(7). *Id.* at 135a-138a. On the merits, the court held that Iraq was liable to petitioners because "*Section 1605(a)(7)*, as amended [*sic*], creates a federal cause of action against officials, employees and agents of a foreign state, as well as the state and its agencies and instrumentalities themselves." *Id.* at 138a. The court further held that suits brought under Section 1605(a)(7) may be based on "conventional common law torts such as assault, battery, and intentional infliction of emotional distress," *ibid.*, and that petitioners had established "the traditional torts of assault, battery and intentional infliction of

emotional distress," *id.* at 139a, as those torts are defined in the Restatement (Second) of Torts §§ 13, 21(1), 46 (1965). Pet. App. 139a-142a. The court awarded between $19 million and $35 million to each former POW, $10 million to each spouse, $5 million to each child, parent, or sibling, and $306 million in punitive damages. *Id.* at 160a-162a. The total judgment exceeded $959 million. *Ibid.*

Promptly thereafter, within the time for filing a motion to reconsider under Federal Rule of Civil Procedure 59(e), the United States moved to intervene in order to contest the subject-matter jurisdiction of the district court and thereby ensure the effectiveness of the President's determination under Section 1503. Pet. App. 53a. The United States argued that because Section 1503 of the EWSAA and Presidential Determination 2003-23 had made 28 U.S.C. 1605(a)(7) inapplicable to Iraq, the court had been divested of subject-matter jurisdiction prior to its entry of the default judgment. The district court denied the government's motion to intervene as untimely. Pet. App. 54a-57a. Considering its jurisdiction sua sponte, the district court held that Section 1503 and the Presidential Determination did not divest the court of jurisdiction that was proper when the suit began. *Id.* at 59a-61a.

5. The United States appealed the district court's denial of its motion to intervene, and argued that Section 1503 and the Presidential Determination had eliminated the district court's subject-matter jurisdiction before judgment was entered.

a. While the United States' appeal was pending, the court of appeals issued its decision in *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), holding that "neither section 1605(a)(7) nor the Flatow Amendment, separately or together, establishes a cause of action against foreign state sponsors of terrorism." *Id.* at 1027. Prior to oral argument in the present case, the court of appeals issued an

order directing the parties to be prepared to address the question whether the case should be remanded or dismissed in light of *Cicippio-Puleo*'s holding.

b. On June 4, 2004, the court of appeals issued a decision vacating the district court's default judgment in petitioners' favor and dismissing the suit. Pet. App. 39a. The court of appeals first held that the district court abused its discretion in denying the United States' motion to intervene. The court noted that the United States' sole purpose was to raise "a highly tenable challenge" to the district court's subject-matter jurisdiction, and that there were weighty foreign policy interests at stake and no prejudice to petitioners. *Id.* at 18a-19a.

Next, the court of appeals held that Section 1503 of the EWSAA does not apply to Section 1605(a)(7). Pet. App. 20a. Although finding it "an exceedingly close question," the court concluded that the power conferred on the President by Section 1503 did not encompass all statutes that come within its terms, including Section 1605(a)(7), *id.* at 22a, but was implicitly limited to "legal restrictions on assistance and funding for the new Iraqi Government," *id.* at 34a. The court held, therefore, that the President had exceeded his authority under Section 1503 and acted *ultra vires* when he purported to render Section 1605(a)(7) inapplicable to Iraq. *Ibid.*

Finally, the court of appeals turned to the issue it had posed in the pre-argument order, whether the case should be remanded or dismissed for failure to state a cause of action. The court noted that petitioners' complaint asserted a cause of action under Section 1605(a)(7) as "amended" by the Flatow Act. Pet. App. 36a. But *Cicippio-Puleo* definitively held that neither Section 1605(a)(7), nor the Flatow Act, nor the two together, create a cause of action against foreign states. *Id.* at 37a. The court of appeals observed that, while petitioners also "alluded to the 'traditional torts of assault,

battery and intentional infliction of emotional distress' in their generic form," they "did not point to any other specific source in state, federal, or foreign law for their cause of action." *Id.* at 36a (citation omitted). The court observed that, although petitioners "gestured again toward generic common law torts" at oral argument, "generic common law cannot be the *source* of a federal cause of action." *Id.* at 38a. The court explained: "The shared common law of the states may afford useful guidance as to the rules of decision in a FSIA case where a cause of action arises from some specific and concrete form of law. * * * But there is no support for the proposition that generic common law itself may furnish the cause of action. Rather, as in any case, a plaintiff proceeding under the FSIA must identify a particular cause of action arising out of a specific source of law." *Ibid.*

Because the court of appeals' *Cicippio-Puleo* decision and its pre-argument order put petitioners on notice of the issue, Pet. App. 39a, and because, "[w]hen pressed repeatedly at oral argument, [petitioners] offered no coherent alternative [basis for liability]," *id.* at 38a, the court ordered dismissal of petitioners' suit for failure to state a cause of action, *id.* at 39a.

c. Judge Roberts concurred in the dismissal of petitioners' suit, but did so on the jurisdictional grounds advanced by the United States. Pet. App. 40a. He observed that Section 1605(a)(7) is "on its face a 'provision of law that applies to countries that have supported terrorism,'" and rejected the majority's inference of additional limitations to circumscribe the President's authority. *Ibid.* Judge Roberts also noted that Congress had, at nearly the same time, enacted another statute which did expressly cabin the President's authority by using "more limited language along the lines of the majority's construction," *id.* at 41a, and that petitioners bore the burden to "demonstrate that Congress intended

something less than what [Section 1503] on its face says," *id* at 44a.

ARGUMENT

Petitioners challenge the court of appeals' holding that neither the Flatow Act nor generic common law provides a basis for imposing liability on foreign states. That holding is correct and does not conflict with any decision of this Court or of another court of appeals. Further review by this Court is therefore not warranted.

This case would not, in any event, be a suitable vehicle for considering petitioners' substantive arguments because, contrary to the conclusion of the court of appeals majority, the courts were deprived of jurisdiction over petitioners' claims when, prior to entry of judgment and pursuant to authority conferred on him by Section 1503 of the EWSAA, the President rendered 28 U.S.C. 1605(a)(7) inapplicable to Iraq.

1. The Court could not reach the substantive issues raised by petitioners in this case without first deciding whether the May 7, 2003 Presidential Determination immediately divested the courts of subject-matter jurisdiction over petitioners' claims, prior to entry of judgment, and therefore required dismissal of petitioners' complaint on that antecedent ground. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). A party who prevailed below may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (citation omitted). That is especially so with respect to questions of subject-matter jurisdiction. *Steel Co.*, 523 U.S. at 94-95.

Here, the United States urged in both the district court and court of appeals that, pursuant to EWSAA Section 1503,

the President rendered Section 1605(a)(7) inapplicable to Iraq on May 7, 2003, and thereby immediately divested the district court of jurisdiction to hear petitioners' suit. If the Court were to agree with the United States on this jurisdictional issue, the Court would not be able to reach the substantive issues on which petitioners seek review. *Steel Co.*, 523 U.S. at 110.

a. Congress authorized the President in EWSAA Section 1503 to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or *any* other provision of law that applies to countries that have supported terrorism." 117 Stat. 579 (emphasis added). The President fully exercised that power in Presidential Determination No. 2003-23, in which he decided to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act * * * and any other provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. at 26,459. Those provisions plainly encompass 28 U.S.C. 1605(a)(7), the sole alleged basis for subject-matter jurisdiction in this case. By its terms, Section 1605(a)(7) abrogates foreign sovereign immunity for certain claims against a country "designated as a state sponsor of terrorism" under Section 6(j) of the Export Administration Act or under Section 620A of the Foreign Assistance Act. 28 U.S.C. 1605(a)(7)(A). The court of appeals erred in failing to give full effect to the plain text of Section 1503. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there").

To the extent there is any doubt whether Section 1503 encompasses 28 U.S.C. 1605(a)(7), the President has made clear his judgment that it does. In his formal report to Congress, the President explicitly stated his conclusion that both Section 1503 and the Presidential Determination encompass

"28 U.S.C. § 1605(a)(7)." See 39 Weekly Comp. Pres. Doc. 21, *supra*, at 647-648. Indeed, the President specifically referred to only three provisions as among the "other provisions of law" rendered inapplicable by his determination: Section 1605(a)(7); the FSIA's attachment provision, 28 U.S.C. 1610; and Section 201 of TRIA, 116 Stat. 2337, which creates special rules for the execution of a judgment issued under Section 1605(a)(7) against a terrorist state's frozen assets. 39 Weekly Comp. Pres. Doc. 21, *supra*, at 647-648. Because Congress entrusted the implementation of Section 1503 to the President, and because the President has independent constitutional authority in the area of foreign affairs, the court of appeals majority was wrong not to accord any deference to his construction of that provision, especially in light of the majority's recognition that 28 U.S.C. 1605(a)(7) falls within the literal terms of EWSAA Section 1503, Pet. App. 22a, and its conclusion that the interpretation of Section 1503 presented "an exceedingly close question," *id.* at 20a. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981) (Presidential action in foreign affairs context, authorized by Congress, "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation") (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

The conclusion by the majority below that Section 1503 should be confined to a narrower set of "provisions that present obstacles to assistance and funding for the new Iraqi Government," Pet. App. 20a, imposes an unwarranted limitation on the statute. Although the majority believed that the relevant criterion of similarity between Section 620A and the "other" provisions referred to in Section 1503 was that they impose "obstacles to assistance and funding," the text of Section 1503 expressly provides a different test of similarity —namely, whether the other provision of law is one that "ap-

plies to countries that have supported terrorism." And Section 1503 applies categorically to "*any*" such provision of law, language that plainly "demonstrates breadth." *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (citation omitted). Indeed, by its terms, Section 1503 reaches many sanctions that had applied to Iraq as a terrorist state, but which would be excluded by the majority's cramped construction because they do not relate to "assistance" or "funding," including the prohibition on exports (50 U.S.C. App. 2405(j)) and military contracts (10 U.S.C. 2327(b)), and the denial of visas to Iraqi nationals (8 U.S.C. 1735) (Supp. II 2002).

In any event, Section 1605(a)(7) *is* a statute that, to use the words of the majority below, "present[s] obstacles to * * * funding for the new Iraqi Government." Pet. App. 20a. As his Message to Congress explained, the President concluded that the "threat of attachment or other judicial process" against Iraqi assets necessary to stabilize and rebuild Iraq posed an "unusual and extraordinary threat * * * to the national security and foreign policy of the United States." 39 Weekly Comp. Pres. Doc. 21, *supra*, at 647. It was for this reason that the President singled out Sections 1605(a)(7) and 1610 of the FSIA and Section 201 of the TRIA, all of which pertain to the entry and execution of judgments against terrorist states, as among those rendered inapplicable to Iraq by the Presidential Determination. Thus, even under the majority's implied limitation on the scope of Section 1503, it erred in refusing to defer to the President's determination that the prospect of billion dollar judgments would seriously undermine funding for the essential tasks of the new Iraqi Government.

b. The majority stated that, because it found as a matter of statutory construction that Section 1503 did not permit the President to make 28 U.S.C. 1605(a)(7) inapplicable to Iraq, it need not consider whether Section 1503 would operate "ret-

roactively" as to this lawsuit. Pet. App. 31a. There is, however, no serious question of retroactivity here. Just days after the panel's decision, this Court held in *Republic of Austria* v. *Altmann*, 124 S. Ct. 2240 (2004), that application of changes in the United States' policy respecting foreign sovereign immunity to causes of action that arose before the policy change do not implicate retroactivity concerns. The Court reasoned that, rather than establishing rights, the doctrine of foreign state immunity "reflects current political realities and relationships," and in light of the courts' history of "deferring to the 'decisions of the political branches . . . on whether to take jurisdiction,'" it is "more appropriate, absent contraindications, to defer to the most recent such decision * * * than to presume that decision *inapplicable* merely because it postdates the conduct in question." *Id.* at 2252 (quoting *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

Section 1503 and the Presidential Determination reflect a most profound shift in the political Branches' foreign policy toward Iraq—from viewing it as an enemy to a state subject to our protection. The success of Iraq is critical to United States foreign policy. It is this most recent policy, manifested in EWSAA Section 1503 and the President's determination to render 28 U.S.C. 1605(a)(7) inapplicable to Iraq, to which the courts should defer. Whereas subjecting Iraq to suit under Section 1605(a)(7) served the United States' foreign policy interests by threatening large damage awards for the wrongs of the Hussein regime, in the immediate aftermath of the removal of that regime by military force, such judgments would hinder crucial foreign policy objectives. Thus, in accordance with *Altmann*, and a long line of cases holding that statutes ousting the courts' jurisdiction are to be given immediate effect in pending cases, *e.g.*, *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952); *Hallowell* v.

Commons, 239 U.S. 506, 508 (1916); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 108, 110 (1801), application of EWSAA Section 1503 to this pending litigation does not raise retroactivity concerns.

Moreover, as Judge Roberts noted in his concurring opinion (Pet. App. 49a-50a), the Presidential Determination making Section 1605(a)(7) inapplicable to Iraq, including in this suit, does not upset any settled expectations of petitioners. At the time of petitioners' injuries, which was prior to enactment of Section 1605(a)(7), Iraq was immune from suit in U.S. courts on claims such as petitioners'. Section 1503 and the Presidential Determination simply restored that immunity and returned petitioners' claims to the realm of international diplomacy. Nor does the Presidential Determination mean that petitioners will be entirely uncompensated. After the new Iraqi regime has had time to become firmly established, the President may choose to espouse petitioners' claims through diplomatic means. Cf. *Dames & Moore*, 453 U.S. at 686. United Nations Security Council Resolution 1483, U.N. Doc. S/Res/1483 (2003), however, imposes a moratorium on claims against frozen Iraqi assets and proceeds of Iraqi oil sales until December 31, 2007, in order to allow "an internationally recognized, representative government of Iraq" to be established. In the meantime, certain international efforts have already been undertaken to provide some measure of compensation to the multitude of Iraq's victims from the First Gulf War.[4]

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[4] The Security Council established the United Nations Compensation Commission (UNCC) to address 2.6 million claims from nearly one hundred countries, seeking approximately $353 billion in damages from Iraq stemming from the First Gulf War. See http://www2.unog.ch/uncc/start.htm. The compensation fund, derived from the proceeds of Iraqi oil sales, has made awards of approximately $52 billion, of which $20 billion have been paid. See http://www2.unog.ch/uncc/status.htm. Among those eligible to apply for

c. The court of appeals majority also relied on its understanding that, pursuant to Section 1503's sunset provision, the Presidential Determination would cease to have effect and Section 1605(a)(7) "would once again be available as a basis of jurisdiction" against Iraq after September 30, 2004. Pet. App. 32a. That view reflects a misconception about the temporal effect of the President's authority to "make inapplicable" provisions such as Section 1605(a)(7). The phrase "make inapplicable" connotes a permanent effect. Similarly, Section 1503's sunset provision provides that the President's "authorities" under the provision would expire; it does not provide that the President's *exercise* of those authorities, if done within the two-year period, would cease to have legal effect after that date.[5]

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compensation from the UNCC were service members of coalition forces who were captured during the war and suffered injuries as a result of violations by Iraq of the Geneva Convention. State Department records indicate that 15 of the 17 service member petitioners in this case applied for and received some compensation through the UNCC. The service member petitioners were also authorized to receive per diem compensation from the Department of Defense, beyond their usual compensation, at twice the normal rate provided by regulation for prisoners of war. See *Gulf POWs to be paid full per diem*, Air Force Times, Sept. 16, 1991, at 4. See also 7A Department of Defense, *Financial Management Regulation* ch. 37 (1999) (except as authorized by the Secretary of Defense, members in captive status are entitled to "50 percent of the world-wide average per-diem rate").

[5] Further, as Judge Roberts observed in his concurring opinion, even if the majority's view of the effect of the sunset provision were correct, the various provisions of law made inapplicable to Iraq by Presidential Determination No. 2003-23 would only come back into force if Congress did nothing in the meantime. Pet. App. 43a. In light of the dramatic change in this Country's relations with Iraq, Judge Roberts noted that "the occurrence of 'intervening events' [such as further Congressional action] is far more likely than their absence." *Ibid.* Indeed, Congress has acted to extend the President's authorities under EWSAA Section 1503 to September 30, 2005. See Emergency Supplemental Appropriations Act for Defense and for the Recon-

d. For the foregoing reasons, dismissal of petitioners' claims in this case was required by the President's determination to make 28 U.S.C. 1605(a)(7)—the only basis for petitioners' suit—inapplicable to Iraq. The issues petitioners raise about other aspects of the court of appeals' decision therefore are of no moment, and in any event they are, as explained below, without merit.

2. Petitioners claim three errors in the court of appeals' analysis of the causes of action available to them. First, petitioners contend that the court of appeals improperly required them to identify a federal cause of action and thereby "ignor[ed] the clear availability of state law causes of action" under the FSIA. Pet. 23; see Pet. 8-12. Second, petitioners contend that the court of appeals erred in concluding that the Flatow Act does not create a federal cause of action against foreign states. Pet. 19-22. And, third, petitioners contend that the court of appeals erred in failing to examine "the availability of causes of action under federal common law for violations of universally accepted international legal norms." Pet. 23; see Pet. 12-19. None of these contentions has merit.[6]

a. When a statutory exception to foreign sovereign immunity exists, the FSIA makes foreign states liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. Petitioners repeatedly assert that the court of appeals erred by "ignoring" or

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struction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230.

[6] Although the United States did not intervene for the purpose of raising substantive objections to petitioners' default judgment, the United States has participated as amicus curiae in several cases before the court of appeals to address the same issues—indeed, the court of appeals directed the United States to submit its views in the *Cicippio-Puleo* case—and the substantive analysis of the court of appeals is consistent with the views the United States has articulated.

"strip[ping] out the state [tort] law" causes of action that can provide a basis for liability against a foreign state subject to suit under Section 1605(a)(7). See, *e.g.*, Pet. 2, 8, 11, 23. Petitioners mischaracterize the court of appeals' decision.

The court of appeals did not reject the possibility that state or foreign law could provide a basis for a foreign state's liability in a suit under Section 1605(a)(7). To the contrary, it specifically noted that state or foreign law might be an appropriate source of law. See Pet. App. 36a (noting petitioners' failure to "point to any * * * specific source in state, federal, or foreign law for their [common law] cause of action"). Thus, the court's repeated admonition that a plaintiff in a suit under the FSIA "must identify a particular cause of action arising out of a specific source of law," *id.* at 38a, plainly contemplates that "state * * * or foreign law" could provide the basis for a foreign state's liability in a suit under Section 1605(a)(7). Indeed, in *Cicippio-Puleo*, to which the panel referred, the court of appeals specifically recognized the possibility that state or foreign law could provide the basis for liability in a Section 1605(a)(7) suit. See 353 F.3d at 1036 (remanding case to give plaintiffs an opportunity to assert "a cause of action under some other source of law, *including state law*") (emphasis added). And, as petitioners concede (Pet. 10 n.1), the court of appeals has continued to acknowledge the possibility that state law might provide a source of liability in cases decided after this one. See *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129, 1134 (D.C. Cir. 2004) (noting that plaintiff had alleged "a number of sources that could provide a cause of action, including state, federal, foreign, and international law," though declining to decide, on interlocutory appeal, "[w]hether state tort law properly provides the plaintiff with a cause of action" in that case); *Price* v. *Socialist People's*

Libyan Arab Jamahiriya, 389 F.3d 192, 200 (D.C. Cir. 2004) (same).

The court of appeals held, however, that a foreign state's liability under the FSIA must arise from a "specific and concrete source of law" of a "specific" sovereign, Pet. App. 36a, 38a, not general common law. That holding is both correct and unexceptional. This Court rejected the concept of "generic common law" as a "brooding omnipresence" in *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). See *Salve Regina College* v. *Russell*, 499 U.S. 225, 226 (1991) (quoting *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)); *Erie*, 304 U.S. at 79. The "common law," the Court explained is not "a transcendental body of law outside of any particular State," but exists only to the extent there is "some definite authority behind it." *Ibid.* (citation omitted). Thus, the court of appeals was correct to insist that "generic common law" cannot serve as the source of a foreign state's liability, but, rather, the plaintiff "must identify a particular cause of action arising out of a specific source of law." Pet. App. 38a. The only decisions cited by petitioners that apply "general principles of liability, such as those set forth in the *Restatements*," to the question of a foreign state's substantive liability in a suit under the FSIA are pre-*Cicippio-Puleo* default-judgment decisions from the District Court for the District of Columbia in which there was no defendant to point out this error. Pet. 15 n.2 (citing *Jenco* v. *Islamic Republic of Iran*, 154 F. Supp. 2d 27, 47-50 (D.D.C. 2001), aff'd *sub nom. Bettis* v. *Islamic Republic of Iran*, 315 F.3d 325 (D.C. Cir. 2003); *Anderson* v. *Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000)).[7]

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[7] In *Bettis*, the D.C. Circuit referred to the Restatement's description of the common law tort of intentional infliction of emotional distress, but did so in the context of assuming *arguendo* that the plaintiffs had a federal cause of action under the Flatow Act and that the Restatement was a proper description of the

Nor is there anything inconsistent between the court of appeals' opinion and this Court's decision in *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983). The Court there recognized that "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *Id.* at 622 n.11. The Court was plainly referring to the law of a *particular* state.[8]

b. Petitioners also argue that the court of appeals erred in rejecting their claim against Iraq under the Flatow Act. Pet. 19. By its terms, however, the Flatow Act does not create a cause of action against a foreign sovereign. Rather, the Flatow Act provides only that an "official, employee, or agent of a foreign state * * * shall be liable" for conduct described in Section 1605(a)(7). 28 U.S.C. 1605 note. Because the statutory language is unambiguous, no further inquiry is necessary. *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 516 (1997).

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scope of this federal cause of action. The court ultimately held that, even so assuming, the plaintiffs could not satisfy the Restatement's standard, which was equally or more permissive than any state court decisions. 315 F.3d at 335-336. *Bettis* therefore is not authority for the proposition that generic common law is a source of liability under the FSIA.

[8] Petitioners argue that, by requiring them to identify a specific state law cause of action, the court of appeals "appears to have confused the question of whether petitioners have valid *causes of action* with the question of which *substantive rules of liability* federal courts should apply in FSIA cases." Pet. 15 n.2. The semantic question whether it is more accurate to refer to Section 1606 of the FSIA as creating a federal cause of action that adopts state or foreign substantive rules of liability, or as permitting liability to be asserted against foreign sovereigns based on state or foreign causes of action, is of no practical consequence here. In either case, the plaintiff must identify the "particular cause of action arising out of a specific source of law," Pet. App. 38a, that would be the basis of liability for "a private individual under like circumstances," 28 U.S.C. 1606.

Additional considerations, however, provide further support for the court of appeals' conclusion that the Flatow Act does not create a cause of action that can be asserted against foreign sovereigns through Section 1606 of the FSIA. Section 1606 provides that, with respect to claims as to which foreign states are not immune, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. The Flatow Act does not create a general cause of action applicable to a "private individual." Like the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, *reprinted in* 28 U.S.C. 1350 note, the Flatow Act provides a cause of action only against a foreign state's *officials*. See 28 U.S.C. 1605 note (Flatow Act provides cause of action against "an official, employee, or agent of a foreign state"); 28 U.S.C. 1350 note (TVPA provides cause of action against "[a]n individual [acting] under actual or apparent authority, or color of law, of any foreign nation"). That the defendant is a foreign governmental "official" or person acting under "actual or apparent authority * * * of a[] foreign nation" is a substantive element of claims under those statutes that excludes both "private individuals" and foreign states from their reach. See H.R. Rep. No. 367, 102d Cong., 1st Sess. 5 (1991) (TVPA "does not attempt to deal with torture or killing by purely private groups"); *id.* at 4 ("only 'individuals,' not foreign states, can be sued under the bill"); accord S. Rep. No. 249, 102d Cong., 1st Sess. 7, 8 (1991).

Moreover, contrasts between Section 1605(a)(7) and the Flatow Act indicate that the omission of foreign states from the Flatow Act's reach was not inadvertent. Section 1605(a)(7), which was enacted in April 1996, abrogates the sovereign immunity of "[a] foreign state" for specified acts engaged in by its officials, employees, or agents. 28 U.S.C. 1605(a) and (a)(7). The Flatow Act, adopted five months

later, specifies that the cause of action it creates runs against an "official, employee, or agent of a foreign state." 28 U.S.C. 1605 note. In light of the obvious relation between the two provisions, the fact that Congress declined in the Flatow Act to "list 'foreign states' among the parties against whom * * * an action may be brought," *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87 (D.C. Cir. 2002), cannot be deemed accidental.

Petitioners urge the Court to circumvent the textual limitations of the Flatow Act by invoking the doctrine of "*respondeat superior*" to apply the Act against foreign states directly. Pet. 20-21. But the court of appeals quite properly rejected that contention. Petitioners' suggestion that courts should imply a private cause of action directly against foreign states under the Flatow Act flies in the face of this Court's admonition against inferring private rights of action not specifically authorized by Congress. See, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-284 (2002); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001); *Alexander* v. *Sandoval*, 532 U.S. 275, 287-288 (2001). That caution is especially appropriate where Congress has provided a private cause of action (against foreign government officials), but that cause of action is by its terms inapplicable. See, *e.g.*, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 209 (2002) (courts should be "reluctant" to "exten[d] remedies not specifically authorized" in express enforcement provisions) (citation omitted).

Those concerns are even more heightened here, in the context of suits against foreign states. See *Dayton* v. *Czechoslovak Socialist Republic*, 834 F.2d 203, 205 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (recognizing that the "amenability of a foreign nation" to suit in the United States is "a sensitive matter"). Congress acted carefully in adopting the Flatow Act and TVPA, taking certain steps to assist victims of state-

sponsored terrorism while not taking others. While Congress took the "significant step" of "authoriz[ing] a cause of action against officials, employees, and agents of a foreign state," it "has yet to take" the "even greater step" of "[r]ecognizing a federal cause of action against foreign states" themselves. *Cicippio-Puleo*, 353 F.3d at 1036.[9] As the court of appeals held in *Cicippio-Puleo*, "it is for Congress, not the courts," to take the additional step of extending those causes of action to foreign states. *Id.* at 1036.

c. Petitioners argue that the court of appeals erred by failing to consider whether they have a cause of action under federal common law or the law of nations for Iraq's violation of international norms against torture. Pet. 12-19. As the petition makes clear, however, petitioners never presented such a claim to the lower courts. See Pet. 4 (listing causes of action advanced by petitioners below); Pet. App. 179a-194a (reproducing petitioners' arguments before the district court respecting bases of liability). Thus, whether such a cause of action exists as a matter of federal common law is not fit for this Court's review. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below.").

It is clear, in any event, that petitioners' contention is meritless. Petitioners ground their argument in this Court's recent decision in *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739 (2004). In *Sosa*, the Court held that while 28 U.S.C. 1350 "creat[es] no new causes of action," it reflected Congress's "understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time," and that "the district courts would recognize" these causes of

[9] Congress acted in a similarly circumspect fashion when it created a general civil cause of action against foreign terrorists, 18 U.S.C. 2333(a), but specifically excluded foreign states and their officers, 18 U.S.C. 2337(2).

action. *Sosa*, 124 S. Ct. at 2761. But the reasoning of the *Sosa* decision relied on unique features of Section 1350 that are not present here.

Both the language and historical context of Section 1605(a)(7) distinguish it from 28 U.S.C. 1350. The latter makes specific reference to a "tort * * * committed in violation of the law of nations," 28 U.S.C. 1350, whereas Section 1605(a)(7) makes no reference to claims based on international law norms. Moreover, the Court made clear that its holding in *Sosa* rested on the "ambient law of the era" in which the predecessor of the current 28 U.S.C. 1350 was enacted, 124 S. Ct. at 2755, in particular, the then-prevailing "conception * * * of the common law as 'a transcendental body of law outside of any particular State,'" *id.* at 2762. But, as noted above, see p. 19, *supra*, and as the Court recognized in *Sosa*, *ibid.*, that understanding of the law was rejected in *Erie*. The Court concluded in *Sosa* that the change of view regarding the common law did not deprive courts of the authority that Section 1350 was originally understood to confer. *Id.* at 2765. That rationale has no application to the FSIA in general or Section 1605(a)(7) in particular, which were enacted long after *Erie* became the settled law of the land. The *Sosa* opinion itself acknowledges that its reasoning was limited to 28 U.S.C. 1350 and did not extend to other jurisdictional statutes that do not share those particular features. 124 S. Ct. at 2765 n.19 (observing that courts would not have authority to develop common law causes of action for international law violations pursuant to 28 U.S.C. 1331). Indeed, in the same month that *Sosa* was decided, the Court recognized that "the FSIA simply limits the jurisdiction of federal and state courts to entertain claims against foreign sovereigns. The Act does not create or modify any causes of action." *Altmann*, 124 S. Ct. at 2251 n.15.

Even if petitioners had raised and the court of appeals had decided the viability of a claim based on international law in light of *Sosa*, and even if petitioners' argument had merit, certiorari would still not be warranted to review that issue, because other courts of appeals have not yet had an opportunity to explore the interplay between the *Sosa* decision and the FSIA. Petitioners contend that the issue cannot percolate further, nor will a circuit conflict develop, because the District of Columbia is, in effect, the sole forum for claims asserted under Section 1605(a)(7). Pet. 23-25. The petition's acknowledgement of cases brought under Section 1605(a)(7) within the Second and Eleventh Circuits, Pet. 24 n.10, disproves that assertion, and there are other examples as well. *E.g.*, *Smith* v. *Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003). Moreover, the question whether claims for violation of the laws of nations can be asserted against foreign states in suits brought under the FSIA is not limited to actions asserting jurisdiction under Section 1605(a)(7), but can arise in suits asserting jurisdiction under other exceptions, such as commercial activity, 28 U.S.C. 1605(a)(2), property taken in violation of international law, 28 U.S.C. 1605(a)(3), or domestic torts, 28 U.S.C. 1605(a)(5). See, *e.g.*, *Altmann*, 124 S. Ct. at 2245 (noting that plaintiff asserted a cause of action for violation of international law in a suit brought under the FSIA's takings exception); *Joo* v. *Japan*, 332 F.3d 679 (D.C. Cir. 2003) (noting claim for sexual enslavement and torture in suit brought under the FSIA commercial activity exception), vacated and remanded, 124 S. Ct. 2835 (2004); *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005) (discussing claims of international terrorism arising out of September 11 attacks in action filed under the FSIA domestic tort exception). Thus, contrary to petitioners' assertions, the D.C. Circuit is not the only court of appeals that could speak to the availabil-

ity of international law claims in suits brought under the FSIA.

3. Finally, petitioners contend that the court of appeals abused its discretion in dismissing their suit for failure to state a cause of action, and they ask this Court to exercise its supervisory power to remedy that alleged abuse. Pet. 25. Petitioners' fact-bound and case-specific request does not merit this Court's review. See *Massachusetts* v. *Sheppard*, 468 U.S. 981, 988 n.5 (1984). This Court will review a decision of a court of appeals under its supervisory authority only when a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). The court of appeals' decision to order dismissal of petitioners' suit does not approach that standard.

Petitioners' principal contention is that failure to state a cause of action is a defense that a defendant may waive by failing to appear in district court and that the court of appeals therefor abused its discretion by reaching out to dismiss their claims on the basis of that "waived non-jurisdictional issue." Pet. 25-26. Petitioners' argument simply ignores Section 1608(e) of the FSIA, which prohibits the entry of a default judgment against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. 1608(e). That provision reflects Congress's recognition of the sensitive nature of suits against foreign states and imposes on the court "an obligation to satisfy itself that plaintiffs have established a right to relief." *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 232 (D.C. Cir. 2003). In light of the statutory prohibition on assessing liability against a foreign state that is not warranted by the law, it was not an abuse of discretion for the court of appeals to take cognizance of its recent holding in *Cicippio-*

Puleo, which directly overruled the principal basis of the district court's judgment against Iraq.[10]

Nor does the court of appeals' refusal to grant petitioners a remand to permit them to identify a particular state or foreign law basis for Iraq's liability warrant exercise of this Court's supervisory authority. Through its pre-argument order referring to the *Cicippio-Puleo* decision, the court of appeals informed petitioners that it was concerned about the viability of their causes of action. Although petitioners maintain that they have viable state-law claims, in none of their filings in this case—including their petition to this Court—have petitioners identified any specific state or foreign law that could serve as the basis for Iraq's liability in this case. See, *e.g.*, Pet. 4, 7.

Nor did petitioners explain to the court of appeals at oral argument which specific state or foreign law establishes Iraq's liability. See Pet. App. 38a. Counsel for petitioners may have been unable to identify a specific source of law that established Iraq's liability. Or perhaps he made a tactical decision not to accept the premise of the court's questions at oral argument in hopes that it would simply affirm the nearly billion-dollar judgment petitioners had won from the district court, albeit on the basis of "generic" common law causes of action rather than the cause of action under the Flatow Act that the district court had found but that the D.C. Circuit's intervening decision in *Cicippio-Puleo* had rendered unavailable. In either event, case-specific issues concerning the court of appeals' disposition of the case would not warrant review by this Court. That is especially so given the thresh-

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[10] Nor, contrary to petitioners' assertions (Pet. 26), was it improper for the court of appeals to recognize the important foreign policy implications of the suit. That observation did not represent a "judicial foray into foreign policy," *ibid.*, but a simple acknowledgment of the importance of the litigation, a fact that the United States had stressed in its briefs.

old jurisdictional bar to this suit in light of the President's determination under EWSAA Section 1503 to render 28 U.S.C. 1605(a)(7) inapplicable to Iraq. That question of subject-matter jurisdiction would have to be considered by this Court before it addressed any other issues raised by petitioners, and the soundness of the President's determination establishes that dismissal of petitioners' suit is required in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CLIFFORD ACREE, *et al.*,

Petitioners,

v.

REPUBLIC OF IRAQ, *et al.*

and

UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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I. The United States Mischaracterizes the Court of Appeals' Holding With Respect to the Availability of a Cause of Action Under Section 1605(a)(7) of the FSIA

The United States does not deny that the Iraqi defendants are liable to petitioners for the acts of torture committed against them "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Nor does the United States deny that Section 1606 of the Foreign Sovereign Immunities Act ("FSIA"), as interpreted by the Court in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), requires courts to apply state law rules of liability. Finally, the United States does not deny that the severe torture inflicted upon petitioners satisfies the elements of assault, battery, and intentional infliction of emotional distress. There is, in short, no dispute that the Iraqi defendants are liable to petitioners under the common law torts adjudicated by the district court.

Unable to disagree with petitioners on any material issue of liability, the United States tries to change the subject to an issue that the court of appeals did *not* address, namely, the question of *which* jurisdiction's law should apply in determining liability under Section 1605(a)(7). However, this was not the basis on which the court of appeals vacated the judgment. Rather, as the following passage indicates, the court of appeals perceived a distinction between what it viewed as the requirement of a "federal cause of action" under the FSIA and the question of what *substantive law* should apply to determine liability:

> [G]eneric common law cannot be the *source* of a federal cause of action. The shared common law of the states may afford useful guidance as to the rules of decision in a FSIA case where a cause of action arises from some specific and concrete source of law. *See Bettis*, 315 F.3d at 333 (assuming, *arguendo*, that plaintiffs stated a cause of action under the Flatow Amendment and then turning to generic common law to flesh out the controlling substantive law). But there is no support

> for the proposition that generic common law itself may furnish the cause of action.

Acree v. Republic of Iraq, 370 F.3d 41, 59 (D.C. Cir. 2004) (underscores added). Clearly, the court of appeals believes that plaintiffs under § 1605(a)(7) must first demonstrate the existence of a "federal cause of action" that is distinct from the "substantive law" (or "rules of decision") that a court would apply to determine liability.

Therein lies a core error of both *Acree* and *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), and the error that requires correction by the Court. Contrary to the suggestion by the United States that these decisions are consistent with the plain language of the FSIA and the Court's decision in *First Nat'l City Bank*, the D.C. Circuit has refused to recognize that Section 1606 of the FSIA already provides the "federal cause of action" that allows federal courts to adjudicate state law claims, including common law torts, against non-immune state sponsors of terror. By requiring plaintiffs to identify a "federal cause of action" *separate* from the state law bases of liability (*e.g.*, torts) that are cognizable under § 1606, the D.C. Circuit has departed from the plain meaning of the statement that foreign sovereigns "*shall be liable* in the same manner and to the same extent as a private individual under like circumstances," as well as the Court's decision in *First Nat'l City Bank*.[1] In addition, the D.C. Circuit has ignored the unmistakable intent of Congress that victims of terror would have the right to seek redress in federal courts. *See* Pet. at 16, n.3; *see also* Brief Amici Curiae of Washington Legal Foundation and 20 Members of Congress at 11-16.

The United States seeks to gloss over this profound misinterpretation of § 1605(a)(7) by implying that the court of

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1. Consider, in this regard, the fact that there is no "federal cause of action" for breach of contract, and yet it is beyond dispute that plaintiffs may bring state law breach of contract claims against non-immune foreign sovereigns under the waiver (§ 1605(a)(1)) or commercial activity (§ 1605(a)(2)) exceptions. There is no distinction between the assertion of state law breach of contract claims under these exceptions and the assertion of state law tort claims under § 1605(a)(7). In neither case is a distinct "federal cause of action" required.

appeals rested its decision on an *Erie*-type concern about *which* jurisdiction's laws should apply in determining substantive liability under § 1605(a)(7). *See* U.S. Br. at 19. This entirely misreads the basis for the court of appeals' decision. Courts in the D.C. Circuit have consistently applied general principles of tort law, such as those found in the *Restatement (Second) of Torts*, in determining liability under § 1605(a)(7). *See Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332-33 (D.C. Cir. 2003) (reviewing D.C. Circuit practice and observing that its courts have "looked to the common law of the states" in FSIA cases). The *Acree* court did not refer to or repudiate this long-established practice and, in fact, it favorably cited *Bettis* for the proposition that "generic common law" may provide the "controlling substantive law" – so long as the court's erroneous requirement of a distinct "federal cause of action" is met.[2] 370 F.3d at 59. Moreover, it would have been passing strange for the court of appeals to vacate the judgment on choice of law grounds, when there is no doubt that the Iraqi defendants would be liable to petitioners in tort under the laws of *every* U.S. state and the District of Columbia, as well as under the laws of any civilized nation whose laws a federal court might apply as the result of a conflicts of law analysis (including the laws of Iraq).[3]

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2. By trying to divert attention from the court of appeals' mistaken interpretation of § 1605(a)(7), the United States has merely highlighted the fact that the circuit courts of appeals are divided on the question of which *substantive* law should apply in FSIA cases – the law of the forum or general principles of common law. *See* Pet. at 15, n.2 (reviewing cases). *See also* 14A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3662, p. 231 (3d ed. 1998) ("there is no clear understanding as to whether the forum state's choice-of-law rules should apply or whether federal common law should govern"). Petitioners encourage the Court to grant certiorari in order to resolve this issue as well as the distinct issue of whether a separate "cause of action" is required under the FSIA.

3. Indeed, the U.S. interpretation of *Acree* leads to the remarkable conclusion that the court of appeals *sua sponte* vacated a $959 million judgment on choice of law grounds even though Rule 8 of the F.R.C.P. does not require plaintiffs to plead state law, and even though "federal courts are required to take judicial notice of the laws of every state of the union." (Cont'd)

By interposing a non-existent requirement for a distinct "federal cause of action," there can be no doubt that the D.C. Circuit has interpreted § 1605(a)(7) to bar plaintiffs from doing exactly what the statute permits – asserting state law claims against state sponsors of terror. The United States does not seriously dispute the fact that the D.C. Circuit is effectively the mandatory venue for cases arising under § 1605(a)(7).[4] Thus, unless the Court corrects the court of appeals' error, the doors of justice will remain closed to U.S. citizens who are victims of terror.

II. The United States' Arguments With Respect to Other Causes of Action Are Mistaken

The D.C. Circuit's mistaken interpretation of the Flatow Amendment is important but ultimately irrelevant, as petitioners unmistakably have a cause of action under § 1605(a)(7) and § 1606 to assert state law claims against all Iraqi defendants. Nonetheless, the United States does not come to terms with the fact that the language and structure of the Flatow Amendment are identical to the Federal Tort Claims Act, which makes the United States liable for the actions of its officials and agents under ordinary principles of *respondeat superior*. Contrary to the United States' assertion that the court

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(Cont'd)

5 Wright & Miller, *Federal Practice and Procedure* § 1253, p. 498 (3d ed. 2004). If this had been the court of appeals' actual concern – and not its misguided belief that the FSIA requires a distinct "federal cause of action" – the correct response would have been to remand to the district court for further development of the controlling law.

4. In addition to the two cases cited by petitioners, the United States cites *one* other case arising under § 1605(a)(7) decided outside the D.C. Circuit, *Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003). This case resulted in a default judgment against the Afghan and Iraqi defendants, and venue was not contested even though it was almost certainly not proper. All of the approximately 45 other cases decided under § 1605(a)(7) have been heard in the D.C. Circuit. Moreover, it is irrelevant (U.S. Br. at 25-26) that *other* types of claims may be litigated against state sponsors of terror in other federal circuits; the issue here is whether the waiver of immunity for acts of torture and other violations of international law specified in § 1605(a)(7) is to have any effect in the D.C. Circuit, the venue that Congress has required for nearly all such claims.

of appeals "properly rejected" this argument, U.S. Br. at 22, the court of appeals did not address this issue *at all*. Moreover, the *amici curiae* brief of the Washington Legal Foundation and 20 Members of Congress (including Rep. Saxton, the original sponsor of the Flatow Amendment) demonstrates that the court of appeals' interpretation of the Flatow Amendment was in error.

Finally, with respect to the availability of a cause of action for violation of universally accepted international legal norms against torture, discussed by the Court last term in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), the United States contends that petitioners did not raise this argument below. This is incorrect. Petitioners specifically identified to the district court the possibility of a "cause of action for torture under customary international law," but noted that it was unnecessary for the court to develop this cause of action in light of the clear availability of other causes of action (*e.g.*, under § 1605(a)(7)). *See* Pet. App. G at 179a, n.17. Moreover, the Court issued its decision in *Sosa* after the court of appeals ruled in this case, precluding any argument concerning the implications of that decision. As for the United States' contention that the principles elaborated in *Sosa* are inapplicable in cases arising under § 1605(a)(7), this argument is fully disposed of in the *amici curiae* brief submitted by the Center for Justice & Accountability and 21 international law scholars at 14-15. Notably, the United States does not appear to dispute the existence of a universally recognized international legal norm against torture.

III. The United States' Jurisdictional Argument, Rejected by the Court of Appeals, Is Without Merit

The United States seeks to relitigate its argument, rejected by the court of appeals below, that the district court was without jurisdiction at the time it entered judgment in this case. The government's argument is that a single clause in a proviso to a supplemental appropriations bill had the effect of permanently and retroactively altering the jurisdiction of federal courts, even though nothing in the

bill or its legislative history makes any reference to federal court jurisdiction. This argument is without merit.

Section 1503 of the Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, 117 Stat. 559 (2003) ("EWSAA"), authorized the President to "suspend the application of any provision of the Iraq Sanctions Act of 1990." The Iraq Sanctions Act, Pub. L. No. 101-513, 104 Stat. 1979 (1990) ("ISA") had required the President to "fully enforce" against Iraq specified laws prohibiting economic assistance to terrorist states, including § 620A of the Foreign Assistance Act of 1961, as well as "all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism." ISA § 586F(c), 104 Stat. 1979, 2051.

Section 620A of the Foreign Assistance Act, 22 U.S.C. § 2371 (2004) ("FAA"), referred to in the ISA, bars U.S. foreign assistance to countries that the Secretary of State has designated as "repeatedly provid[ing] support for acts of international terrorism." Section 620A also sets forth conditions under which the Secretary is authorized to rescind the designation of a country as a state sponsor of terrorism. To do so, the Secretary must certify that the foreign government "is not supporting acts of international terrorism" and that it "has provided assurances that it will not support acts of international terrorism in the future." 22 U.S.C. § 2371(c)(1).

Following the liberation of Baghdad on April 9, 2003, a critical problem facing the U.S. stabilization and reconstruction effort was that the ISA and other laws that prohibited assistance to Iraq would bar the transfer of funds and material to Iraq unless Iraq was decertified as a state sponsor of terror. There was, however, no Iraqi government in place to provide the representations required under § 620A of the FAA. Section 1503 of the EWSAA therefore authorized the President to suspend the ISA, subject to eight provisos. The second proviso stated that "the President may make inapplicable with respect to Iraq section 620A of the

Foreign Assistance Act of 1961 *or any other provision of law that applies to countries that have supported terrorism.*" 117 Stat. 579 (emphasis added).

The Government's contention that the clause italicized above was somehow intended to affect the jurisdiction of federal courts violates "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The purpose of § 1503 was to authorize the President to suspend the ISA, which, as described above, prohibited economic assistance to Iraq and called for enforcement of other laws that "impose sanctions" on state sponsors of terrorism. The second proviso, which necessarily relates to the enacting clause, *see United States v. Morrow*, 266 U.S. 531, 534 (1925), elaborates upon this authority by making clear that the President is authorized to suspend § 620A of the FAA, a law that likewise prohibits economic assistance to state sponsors of terrorism. As the court of appeals cataloged below, *all* of the laws encompassed by the ISA relate to prohibitions on economic assistance to, or trade with, countries that are state sponsors of terrorism, and *none* relate to the jurisdiction of federal courts. *Acree*, 370 F.3d at 53. In this context, and consistent with the overall purpose of the EWSAA, the reference in the second proviso to "any other provision of law that applies to countries that have supported terrorism" logically encompasses only those laws that impose obstacles to the provision of economic and material assistance to Iraq.

The scope of § 1503 is confirmed by its legislative history. The EWSAA originated as a request from the President for emergency supplemental appropriations to support military operations in Iraq. In his request, the President proposed a repeal of the ISA, subject to the proviso "that the President may make inapplicable with respect to Iraq section 620A of the [FAA] or other provision of law that applies to countries that have supported terrorism." H.R. Doc. No. 108-55, at 24 (2003). The request explained that this proviso would "authorize the President to make

inapplicable with respect to Iraq section 620A, section 620G, and section 307 of the Foreign Assistance Act."[5] *Id.* The President's request made no mention of the FSIA, federal jurisdiction, or of absolving Iraq of past liabilities.

The President's proposed language went through the House and Senate materially unchanged, and both the House and Senate reports explained that the provision would allow the President to suspend the ISA and other laws that imposed limitations on assistance to Iraq. *See Acree*, 370 F.3d at 55. The final conference report explained that § 1503 "would make inapplicable the Iraq Sanctions Act of 1990 and authorize the President to make inapplicable with respect to Iraq section 620A and section 307 of the Foreign Assistance Act." H.R. Conf. Rep. No. 108-76, at 76 (2003). Neither the conference report nor any other part of the legislative history contains any reference to the FSIA, the jurisdiction of federal courts, or to the notion of absolving Iraq of liability for its torture of American POWs while designated as a state sponsor of terrorism.

The United States pegs much of its jurisdictional argument on the notion that Congress intended § 1503 to deal with "dramatically changed circumstances in Iraq." U.S. Br. at 4. What the United States fails to address, however, is the fact that Congress has already established a clear temporal rule concerning the immunity of former terrorist states. In this regard, § 1605(a)(7) provides that a foreign state is not immune for acts of torture, and federal courts continue to have jurisdiction, if the foreign state was designated as a state sponsor of terrorism *"at the time the act occurred."* 28 U.S.C. § 1605(a)(7). In adopting such clearly retroactive language, Congress could not have been more explicit that former terrorist states are not absolved of liability when their status later changes, even "dramatically."

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5. Section 620G of the FAA prohibits assistance to any country that supports a designated state sponsor of terrorism, *see* 22 U.S.C. § 2377; section 307 of the FAA prohibits U.S. multilateral assistance to designated countries, including Iraq, *see* 22 U.S.C. § 2227.

It is undisputed that Iraq was designated as a state sponsor of terrorism at the time it tortured the 17 American POWs who are the petitioners in this case. It is also undisputed that, on this basis, the district court properly exercised jurisdiction over petitioners' claims. *See* Pet. App. C at 137a. The Government's jurisdictional argument therefore depends on the proposition that § 1503 *sub silentio* repealed the temporal rule of immunity under § 1605(a)(7), at least as it relates to Iraq.

The Government's interpretation of § 1503 violates the rule of statutory construction that "'where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)). As the Court has explained,

> [A] subsequent statute in general terms . . . and not expressly contradicting the original act . . . shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.

Id. (quoting T. Segwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874)). *See also Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 374 (1990); *Traynor v. Turnage*, 485 U.S. 535, 551 (1988). Even if one were to accept the hypothesis that § 1503 had any bearing upon § 1605(a)(7), it is entirely possible to interpret the two statutes in a way that gives effect to both. The authorization given to the President to "make inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism" is naturally read as authorizing the President to treat Iraq as if it were no longer designated as a state sponsor of terror. This interpretation would be consistent with the purpose of removing obstacles to the reconstruction of Iraq and acknowledging the changed status of that country after the downfall of Saddam Hussein. Nonetheless, under the plain language of § 1605(a)(7), which § 1503 did not address, this would only have the effect of

restoring Iraq's immunity for acts committed *after* the Presidential determination. Nothing in the purported authorization to make the FSIA "inapplicable with respect to Iraq" compels the conclusion that Congress intended to upset the temporal principle clearly established by § 1605(a)(7), *i.e.*, that immunity and jurisdiction are based on the foreign sovereign's status at the time the act occurred.[6]

The United States has nothing to say about this fundamental flaw in its jurisdictional argument, even though both opinions of the court of appeals discussed the temporal rule of § 1605(a)(7) at length. The specificity of § 1605(a)(7) with regard to when immunity attaches could not be more evident. Congress foresaw that a terrorist state might later be decertified as a state sponsor of terror, but it unmistakably provided that the foreign state would not thereby gain immunity for acts that it committed when it was so designated. It defies belief that Congress had a "clear intention" to overturn this carefully articulated principle through a proviso in a supplemental appropriations bill that does not even make reference to the FSIA, let alone to the temporal rule of § 1605(a)(7).[7]

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6. In his concurrence below, Judge Roberts hypothesized that Congress *might* have intended to set aside the clear temporal principle of § 1605(a)(7) as it applied to Iraq, but agreed that this "view of Congress's purpose" in enacting § 1503 was "necessarily speculative." *Acree*, 370 F.3d at 63. If it requires speculation to interpret a statute so as to repeal the "more particular or positive provisions" of a previously enacted statute, such an interpretation necessarily fails the clear intent requirement articulated in *Radzanower* and other cases.

7. For the same reason, the claim that the President's interpretation of § 1503 is entitled to "deference" is misplaced. U.S. Br. at 12. Congress did not even remotely authorize the President to absolve Iraq of its past liabilities or alter the temporal rule of § 1605(a)(7), and thus the President's actions in the exercise of foreign affairs are not entitled to the presumption of validity discussed in *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). In fact, it was not until *after* Congress enacted the EWSAA that the President first took the position that § 1503 encompassed the FSIA, and then only in his report to Congress – not in the actual Presidential Determination published in the Federal Register. *See* Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 16, 2003). The President's claim that § 1503 encompasses the FSIA has every appearance of being a post hoc invention specifically conceived to defeat the judgment in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CLIFFORD ACREE, *et al.*,

Petitioners,

v.

REPUBLIC OF IRAQ, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* CENTER FOR JUSTICE & ACCOUNTABILITY AND INTERNATIONAL LAW SCHOLARS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Center for Justice & Accountability (CJA) and the twenty-one international scholars identified in the attached Appendix hereby move, pursuant to S. Ct. R. 37.2, for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit. Petitioners and respondent United States of America have consented to the filing of the brief *amici curiae*. The Republic of Iraq was notified of this filing but did not respond. A copy of the proposed brief is attached.

Amicus CJA is a non-profit legal advocacy center that works to prevent torture and other severe human rights abuses around the world by helping survivors hold their perpetrators accountable. CJA represents survivors and their families in actions for redress that call for the application of human rights standards under United States law and customary international law. It has filed several civil lawsuits in U.S. federal courts under the Alien Tort Statute and the Torture Victim Protection Act.

Amici international law scholars are experts in the fields of international law and human rights law. They are committed to promoting respect and compliance with the rule of law in both domestic and international fora. Thus, their participation will assist this Court in understanding the profound implications of this case.

Amici submit this brief to demonstrate that federal courts may recognize private claims under federal common law when Congress so intends for violations of international law that are universal, definable, and obligatory. As such, torture claims are actionable under federal common law pursuant to

the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act (FSIA).

The D.C. Circuit's analysis in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), contradicts the express terms of the FSIA and does not comport with the legislative record. It also contradicts this Court's recent ruling in *Sosa v. Alvarez-Machain*, __U.S.__, 124 S. Ct. 2739 (2004). In light of the mandatory venue provisions for claims against state sponsors of terrorism, the D.C. Circuit's opinion effectively bars all such actions. These errors must be corrected.

For the foregoing reasons, *Amici* respectfully request that the Court grant leave to file the attached brief *amici curiae*.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

This *amici* brief is respectfully submitted in support of the petition for writ of certiorari to the Court of Appeals for the District of Columbia Circuit by the Center for Justice & Accountability and the twenty-one international law scholars identified in the attached Appendix.[1]

Amicus Center for Justice & Accountability (CJA) is a non-profit legal advocacy center that works to prevent torture and other severe human rights abuses around the world by helping survivors hold their perpetrators accountable. CJA represents survivors and their families in actions for redress that call for the application of human rights standards under United States law and customary international law. It has filed several civil lawsuits in U.S. federal courts under the Alien Tort Statute and the Torture Victim Protection Act.

Amici international law scholars are experts in the fields of international law and human rights law. They are committed to promoting respect and compliance with the rule of law in both domestic and international fora. Thus, their participation will assist this Court in understanding the profound implications of this case.

While *Amici Curiae* pursue a wide variety of legal interests, they all share a deep commitment to the rule of law and respect for human rights. *Amici* believe that the narrow principle set forth in *Sosa v. Alvarez-Machain,* __U.S.__, 124 S. Ct. 2739

[1] *Amici Curiae* certify that no counsel for either party authored the brief in whole or in part and that no person or entity, other than *amici curiae*, their members, and their counsel, made any monetary contribution to the preparation or submission of this brief. S. Ct. R. 37.6. This brief is submitted with the consent of petitioners and respondent United States of America. The Republic of Iraq was notified of this filing but did not respond.

(2004), which recognizes a limited right of action under federal common law for serious human rights abuses, should apply to former U.S. prisoners of war alleging torture in cases of state sponsored terrorism pursuant to the Foreign Sovereign Immunities Act.

SUMMARY OF ARGUMENT

In 1996, Congress adopted legislation amending the Foreign Sovereign Immunities Act (FSIA) to allow claims against countries that are designated state sponsors of terrorism. 28 U.S.C. § 1605(a)(7); 28 U.S.C. § 1330(a). In subsequent legislation, Congress expanded the scope of liability for these state sponsors of terrorism. *See, e.g.*, Civil Liability for Acts of State Sponsored Terrorism, Pub. L. 104-208, § 589, 110 Stat. 3009; Victims of Trafficking and Violence Protection Act, Pub. L. 106-386, § 2002(a), 114 Stat. 1543; Terrorism Risk Insurance Act, Pub. L. 107-297, 116 Stat. 2322. The FSIA now provides victims of state sponsored terrorism – from torture and extrajudicial killing to hostage taking and aircraft sabotage – with the ability to seek redress for their injuries in U.S. courts.

In *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), the D.C. Circuit held that the state sponsor of terrorism exception codified in § 1605(a)(7) of the FSIA is merely a jurisdictional grant and that plaintiffs require an independent federal cause of action even for claims of torture. The Court of Appeals did not consider the availability of a cause of action under federal common law. It therefore dismissed the claims of seventeen former U.S. prisoners of war and their families, finding no such cause of action for torture in federal law.

This Court should grant the petition for *certiorari* to remedy the fundamental errors of the opinion below. The D.C. Circuit's analysis contradicts the express terms of the FSIA and does not

comport with the legislative record. The D.C. Circuit's analysis also contradicts this Court's recent ruling in *Sosa v. Alvarez-Machain*, which authorizes federal courts to recognize private claims under federal common law when Congress so intends for violations of international norms that are universal, definable, and obligatory. Indeed, *Sosa* makes abundantly clear that the prohibition against torture constitutes such an actionable claim under federal common law. Significantly, the D.C. Circuit's opinion in *Acree* was issued prior to the Supreme Court's ruling in *Sosa*. Accordingly, this Court should also consider granting the petition, vacating the D.C. Circuit's opinion, and remanding so that the lower courts can properly consider and apply the standards set forth in *Sosa*.

To allow the D.C. Circuit's analysis to stand would establish an odd dichotomy – allowing aliens to sue under a limited cause of action found in federal common law but denying a similar right to former U.S. prisoners of war who have been tortured. It would also send the wrong message to perpetrators of such egregious acts. In light of the mandatory venue provisions for claims against state sponsors of terrorism, 28 U.S.C. § 1391(f), the D.C. Circuit's opinion effectively bars all such actions.

ARGUMENT

I. UNDER *SOSA v. ALVAREZ-MACHAIN*, FEDERAL COURTS MAY RECOGNIZE PRIVATE CLAIMS UNDER FEDERAL COMMON LAW WHEN CONGRESS SO INTENDS FOR VIOLATIONS OF INTERNATIONAL NORMS THAT ARE UNIVERSAL, DEFINABLE, AND OBLIGATORY

In *Sosa v. Alvarez-Machain*, this Court examined the law of nations and its status as part of federal common law. As a preliminary matter, the Court found that the United States upon

independence had received the law of nations "in its modern state of purity and refinement."[2] *Sosa*, 124 S. Ct. at 2755. *See also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 595 (2002); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 842-45 (1989). The law of nations was, therefore, a part of the common law.[3]

While one element of the law of nations was limited to the obligations of states *inter se*, a second element "did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor." *Sosa*, 124 S. Ct. at 2756. There was also "a sphere in which these rules binding individuals for the benefit of other individuals overlapped with

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[2] *See also* Charge to the Grand Jury of Justice James Iredell for the District of South Carolina (May 12, 1794), *quoted in* Stewart Jay, *The Status of the Law of Nations in Early American Law* 42 Vand. L. Rev. 819, 825 (1989) ("The Common Law of England, from which our own is derived, fully recognizes the principles of the Law of Nations, and applies them in all cases falling under its jurisdiction, where the nature of the subject requires it."); 1 Op. Att'y Gen. 26, 27 (1792) ("The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land.").

[3] There is vast support for this basic principle of federal law. *See, e.g.*, Jordan Paust, *International Law as Law of the United States* 1-16 (2d ed. 2003); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 Va. J. Int'l L. 687, 702 (2002); Harold Koh, *Is International Law Really State Law*, 111 Harv. L. Rev. 1824 (1998); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463 (1997); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1280 (1996); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1557 (1984).

the norms of state relationships." *Id. Cf.* Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DePaul L. Rev. 433 (2002).

It was at this jurisdictional nexus between individual and state responsibilities where "torts in violation of the law of nations were understood to be within the common law." *Sosa*, 124 S. Ct. at 2759. Not all claims alleging violations of international law were actionable under the common law, however. In *Sosa*, the Court recognized that only those claimed violations of the law of nations that were definite and "threatened serious consequences in international affairs" were actionable under the common law. *Id.* at 2756.

To determine whether violations of international law are *now* actionable under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, the Court indicated that such claims must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 2761-62. In fact, this cautious approach "is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached" the Supreme Court (*id.* at 2765-66):

> [F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted. *See, e.g., United States v. Smith,* 18 U.S. 153, 5 Wheat. 153, 163-180, 5 L. Ed. 57 (1820) (illustrating the specificity with which the law of nations defined piracy).

Id. at 2765. The Court presented this standard – definite content and widespread acceptance – as a stringent test intended to

prevent litigation of claims for lesser, more parochial, or idiosyncratic abuses.[4] According to the Court, the three historical paradigms that were probably on the minds of the drafters of the ATS were: violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 2761. *See also* 4 William Blackstone, *Commentaries on the Laws of England* 68 (1769).

To recognize private claims under the law of nations, therefore, *Sosa* requires the existence of international norms that are: universal (accepted by the international community); definable (clear and articulable content); and obligatory (establishing binding obligations).

The logic of the *Sosa* standard is well-recognized by the federal courts.[5] The Second Circuit has stated that well-established universal norms of international law are required for adjudicating suits brought under the Alien Tort Statute. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The Ninth Circuit has also echoed this approach, indicating that ATS cases are limited to violations of "specific, universal, and obligatory international norms." *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir.

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[4] In *Sosa*, the Court offered *United States v. Smith* as a model for illustrating the specificity with which the law of nations defines specific norms. In the absence of an international consensus over the definition of piracy, the Court in *Smith* looked to scholarship, custom, and domestic judicial opinions. "What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Id.* at 160-161.

[5] Even Justice Scalia's dissent in *Sosa* correctly recognized that the majority opinion endorsed the same standard applied by many lower courts. *Sosa*, 124 S. Ct. at 2776.

2002); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998).

In sum, the *Sosa* decision establishes that the federal courts may recognize private claims under federal common law when Congress so intends for violations of international norms that are universal, definable, and obligatory.

II. THE PROHIBITION AGAINST TORTURE IS A UNIVERSAL, DEFINABLE, AND OBLIGATORY NORM AND FALLS WITHIN THE *SOSA* FRAMEWORK

In *Sosa*, 124 S. Ct. 2765-66, the Supreme Court cited three modern cases for the proposition that the federal courts may recognize private claims under federal common law for violations of international norms that are universal, definable, and obligatory. Significantly, each of these cases makes clear that the prohibition against torture constitutes such a norm.

In *Filartiga v. Pena-Irala*, for example, the Second Circuit held that an actionable norm under the ATS must "command the general assent of civilized nations" and be capable of "clear and unambiguous" definition.[6] *Filartiga*, 630 F.2d at 881, 884. Torture constituted such a norm. "Having examined the sources from which customary international law is derived – the usage of nations, judicial opinions and the works of jurists – we conclude that official torture is now prohibited by the law of

[6] *Filartiga* established the evidentiary standard adopted by *Sosa*: an international norm must be both generally accepted by "civilized nations" and unambiguously defined. Moreover, *Filartiga* based its formulation on the very same Supreme Court precedent relied on by *Sosa*. Both cases cite *The Paquete Habana*, which recognized that a binding international law norm must command "the general assent of civilized nations" and constitute "a settled rule of international law." *The Paquete Habana*, 175 U.S. 677, 694 (1900).

nations." *Id.* at 884. Indeed, "[t]he prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens." *Id.* "[F]or purposes of civil liability [therefore], the torturer has become – like the pirate and slave trader before him – *hostis humani generis,* an enemy of all mankind." *Id.* at 890.

The second decision cited by the Supreme Court in *Sosa* is Judge Edward's concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). In *Tel-Oren*, the D.C. Circuit dismissed an ATS lawsuit in a *per curiam* decision, with each judge issuing separate concurring opinions. In his opinion, Judge Edwards proclaimed adherence to the legal principles established in *Filartiga*.[7]

[7] Judge Edwards also provided some guidance for identifying those offenses, like torture, that violate current norms of international law.

> To identify such crimes, I look for guidance to the RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 702 (Tent. Draft No. 3, 1982), which enumerates as violations of international law state-practiced, -encouraged or -condoned (a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; (g) consistent patterns of gross violations of internationally recognized human rights. *See also* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Peña-Irala*, 22 HARV. INT'L L.J. 53, 90 (1981) (focusing on genocide, summary execution, torture and slavery as core human rights violations). I, of course, need not determine whether each of these offenses in fact amounts to a law of nations violation for section 1350 purposes. The point is simply that commentators have begun to identify a handful of
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> (Cont'd)

He also acknowledged that only a handful of international claims would be subject to civil liability under the ATS, including torture:

> At this point, it is appropriate to pause to emphasize the extremely narrow scope of section 1350 jurisdiction under the *Filartiga* formulation. Judge Kaufman characterized the torturer in *Filartiga* as follows: "Indeed, for purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind." *Filartiga*, 630 F.2d at 890. The reference to piracy and slave-trading is not fortuitous. Historically these offenses held a special place in the law of nations: their perpetrators, dubbed enemies of all mankind, were susceptible to prosecution by any nation capturing them.

Id. at 781.[8]

(Cont'd)

> heinous actions – each of which violates definable, universal and obligatory norms, *see* Blum & Steinhardt, *supra*, at 87-90 – and in the process are defining the limits of section 1350's reach. [footnote omitted]

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). (Edwards, J., concurring).

[8] Judge Bork, in his concurring opinion, also acknowledged the status of torture under international law. *See Tel-Oren*, 726 F.2d at 819-20 (Bork, J., concurring) ("[T]he proscription of official torture [is] a principle that is embodied in numerous international conventions and declarations, that is 'clear and unambiguous' . . . and about which there is universal agreement 'in the modern usage and practice of nations.'").

The third case cited by the Supreme Court in *Sosa* is *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994). In *Marcos*, the Ninth Circuit indicated that not every violation of international law constitutes an actionable claim under the ATS. Citing *Filartiga* and *Tel-Oren*, the Ninth Circuit indicated that actionable violations of international law must involve norms that are "specific, universal, and obligatory." *Id.* at 1475. In *Marcos*, the prohibition against torture was found to constitute such a universal, definable, and obligatory standard.

> The right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being.

Id. at 1475.

These three cases cited by the Supreme Court are not unique in their approach to torture. Federal courts have consistently found that the prohibition against torture constitutes a universal, definable, and obligatory norm. *See, e.g.*, *Hilao v. Marcos*, 103 F.3d 789 (9th Cir. 1996); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992); *Siderman de Blake v. Republic*, 965 F.2d 699 (9th Cir. 1992); *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Wiwa v. Royal Dutch Petroleum Company*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002); *Tachiona v.*

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Such uniformity should not be surprising. Few international norms are more firmly established than the prohibition against torture. It is recognized in every major human rights instrument. *See, e.g.*, Universal Declaration of Human Rights, art. 5, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, entered into force March 23, 1976, art. 7, 999 U.N.T.S. 171;[9] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, art. 2, 1465 U.N.T.S. 85;[10] European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force Sept. 3, 1953, art. 3, 213 U.N.T.S. 221;[11] American Convention on Human Rights, entered into force July 18, 1978, art. 5(2), 1144 U.N.T.S. 123;[12] African Charter on Human and Peoples'

[9] As of January 1, 2005, there are 154 States Parties to the International Covenant on Civil and Political Rights. The United States has ratified the International Covenant.

[10] As of January 1, 2005, there are 139 States Parties to the Convention against Torture. The United States has ratified the Convention against Torture.

[11] As of January 1, 2005, there are 45 States Parties to the European Convention.

[12] As of January 1, 2005, there are 25 States Parties to the American Convention. The United States has signed (but not ratified) the American Convention.

Rights, entered into force Oct. 21, 1986, art. 5, OAU Doc. CAB/ LEG/67/3/Rev. 5.[13]

The Third Geneva Convention Relative to the Treatment of Prisoners of War, which is directly applicable to the Petitioners' case, affirms the fundamental character of the universal prohibition against torture and its application even in times of armed conflict.[14] Geneva Convention Relative to the Treatment of Prisoners of War, entered into force Oct. 21, 1950, 75 U.N.T.S. 135. The Third Geneva Convention prohibits torture and inhuman treatment of prisoners of war. *Id.* at art. 130. Indeed, such acts constitute grave breaches under the Geneva Convention, subjecting the perpetrator to criminal liability. *Id.* at art. 129. Significantly, "[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of" such grave breaches. *Id.* at art. 131. *See generally III Geneva Convention Relative to the Treatment of Prisoners of War* 617-630 (Jean S. Pictet ed. 1960).

In sum, *Sosa* and its antecedents, along with the extraordinary international consensus on this point, make it abundantly clear that the prohibition against torture is a universal, definable, and obligatory norm.

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[13] As of January 1, 2005, there are 53 States Parties to the African Charter.

[14] As of January 1, 2005, there are 192 States Parties to the Third Geneva Convention. The United States has ratified the Third Geneva Convention.

III. CONTRARY TO THE D.C. CIRCUIT'S ANALYSIS IN *ACREE*, TORTURE CLAIMS ARE ACTIONABLE UNDER FEDERAL COMMON LAW PURSUANT TO THE STATE SPONSOR OF TERRORISM EXCEPTION IN THE FOREIGN SOVEREIGN IMMUNITIES ACT

If federal common law recognizes a limited right of action for violations of international law that are universal, obligatory, and definable in ATS cases, surely this logic applies with equal force to claims of torture litigated under the state sponsor of terrorism exception in the FSIA.[15] Given the marked evidence of congressional intent in the FSIA, there is no principled basis for distinguishing between these two classes of plaintiffs-victims.

Holding torture claims actionable under the state sponsor of terrorism exception in the FSIA is consistent with this Court's ruling in *Sosa*. Indeed, the parallels between the ATS analysis in *Sosa* and the FSIA analysis in this case are striking.

In *Sosa*, for example, the Court noted that "Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; . . ." *Sosa*, 124 S. Ct. at 2765. A comparable congressional assumption exists in this case. *See* H.R. Rep. No. 103-702, at 2 (1994) (purpose of the state sponsor of terrorism exception was to allow U.S. citizens "to maintain a federal cause of action for damages against the foreign government involved.").[16]

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[15] *Cf.* Ralph G. Steinhardt, *International Humanitarian Law in the Courts of the United States: Yamashita, Filartiga, and 911*, 36 Geo. Wash. Int'l L. Rev. 1, 30 (2004).

[16] The FSIA text supports the argument that Congress assumed

(Cont'd)

In *Sosa*, the Court noted that Congress had not challenged *Filartiga* and its progeny and had, in fact, responded "by enacting legislation supplementing the judicial determination in some detail." *Id.* at 2765. A comparable congressional response exists in this case. *See* Civil Liability for Acts of State Sponsored Terrorism, Pub. L. 104-208, § 589, 110 Stat. 3009; Victims of Trafficking and Violence Protection Act, Pub. L. 106-386, § 2002(a), 114 Stat. 1543; Terrorism Risk Insurance Act, Pub. L. 107-297, 116 Stat. 2322.

Sosa is instructive in yet another respect. In *Sosa*, 124 S. Ct. at 2762, the Court recognized the power of the federal courts "to create federal common law rules in interstitial areas of particular federal interest." The Court cited the foreign affairs realm as one such area.[17] The Court indicated, however, that "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." *Id.* And, in this respect, the Court expressed some caution about recognizing private claims under federal common law. "We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role

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(Cont'd)
the existence of causes of action for certain acts of state sponsored terrorism. This would explain the various references to claims and causes of action in the text. *See, e.g.*, 28 U.S.C. § 1605 (f)-(g) .

[17] *Accord, Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) ("[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."). *See also* Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740 (1939).

in the field have not affirmatively encouraged greater judicial activity." *Id.* at 2763.

But such concerns are simply not evident in the present case. Congress has spoken, and spoken often. There is a clear mandate set forth in the legislative record and accompanying statutory scheme that victims of state sponsored terrorism are entitled to compensation for their injuries. Indeed, the congressional mandate in this area far exceeds the more modest mandate recognized by the Court in *Sosa.*

For these reasons, the federal courts may recognize torture claims as a matter of federal common law under the Foreign Sovereign Immunities Act even though a comparable power may not exist under 28 U.S.C. § 1331. In *Sosa*, 124 S. Ct. at 2765, the Court rejected Justice Scalia's concerns that accepting a federal court's ability to recognize private claims under federal common law would extend such power to the grant of federal question jurisdiction under 28 U.S.C. § 1331. The Court correctly focused on the unique status of the ATS and congressional understanding of the statute to distinguish its jurisdictional grant from the jurisdictional grant set forth in § 1331. *See* Beth Stephens, *Sosa v. Alvarez-Machain: "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 Brook. L. Rev. 533, 549 (2005). In the present case, the jurisdictional grant set forth in the FSIA with respect to claims of torture perpetrated by state sponsors of terrorism is more akin to the ATS than § 1331.

Finally, doctrines of judicial abstention do not apply in this case. While comity concerns may limit a court's ability to recognize a private right of action in some cases, such concerns are not evident here. Torture is one of the few international norms that reflect both substantive agreement as to its underlying prohibition and procedural agreement as to the appropriate

response for such acts. As Justice Breyer rightly noted in his concurring opinion in *Sosa*, litigating claims of torture "will not significantly threaten the practical harmony that comity principles seek to protect." *Sosa*, 124 S. Ct. at 2783.

In *Acree v. Republic of Iraq*, 370 F.3d at 43, the D.C. Circuit held that the state sponsor of terrorism exception codified in § 1605(a)(7) of the FSIA is merely a jurisdictional grant and that plaintiffs require an independent federal cause of action even for claims of torture. The Court of Appeals did not consider the availability of a cause of action under federal common law. Significantly, the *Acree* ruling pre-dates this Court's opinion in *Sosa*.[18]

In sum, and contrary to the D.C. Circuit's analysis in *Acree*, torture claims are actionable under federal common law pursuant to the state sponsor of terrorism exception in the Foreign Sovereign Immunities Act.

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[18] In *Acree*, the D.C. Circuit relied on its earlier ruling in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1036 (D.C. Cir. 2004), a decision that also pre-dates this Court's decision in *Sosa*.

CONCLUSION

The D.C. Circuit's analysis in *Acree v. Republic of Iraq* contradicts the express terms of the FSIA and does not comport with the legislative record. It also contradicts this Court's recent ruling in *Sosa v. Alvarez-Machain.* In light of the mandatory venue provisions for claims against state sponsors of terrorism, the D.C. Circuit's opinion effectively bars all such actions. These errors must be corrected.

Accordingly, this Court should grant the petition for *certiorari* to remedy the fundamental errors of the opinion below. In the alternative, this Court should consider granting the petition, vacating the D.C. Circuit's opinion, and remanding so that the lower courts can properly consider and apply the standards set forth in *Sosa.*

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(3)

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IN THE

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CLIFFORD ACREE, *et al.*,
Petitioners,

v.

REPUBLIC OF IRAQ, *et al.*,

and

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR ST. MARY'S UNIVERSITY SCHOOL OF LAW CENTER FOR TERRORISM LAW, THE NATIONAL LEAGUE OF POW/MIA FAMILIES, THE NATIONAL COMMANDER & NATIONAL ADJUTANT OF AMERICAN EX-PRISONERS OF WAR, AND DISTINGUISHED AMERICAN FORMER NATIONAL SECURITY OFFICIALS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Petitioners Colonel Cifford Acree, *et al.*, and Respondent the United States of America have each consented to the filing of this brief by *amici curiae*, St. Mary's University School of Law Center for Terrorism Law ("CTL"); National League of POW/MIA Families; and a Group of Distinguished Former High-Level American National Security Officials. Because the Republic of Iraq, *et al.*, have not consented, CTL, *et al.*, hereby move, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amici curiae* brief in support of Petitioners.

CTL is a non-partisan, non-profit, fully operational legal research center dedicated to the study of issues associated

with both antiterrorism and counterterrorism. CTL's mission is to examine current and potential legal issues related to terrorism in light of the challenge of achieving and maintaining a proper balance between global security and civil justice. The director of CTL is professor Jeffrey F. Addicott, a former Army Judge Advocate, who served in senior legal positions throughout the world, and now specializes in national security law and human rights law.

CTL pursues this goal through professional exchanges such as symposia and consultation; writing, commenting on, and publishing written materials; and ensuring access to extensive information resources regarding terrorism. The national security interests at stake in this case are of great importance. CTL has an interest in the effect this case will have on protecting United States military personnel held as prisoners of war ("POWs") from brutal torture, and its impact on eroding a longstanding and important security policy of the United States in support of effective war fighting—that is, this nation's commitment against the torture of POWs, the practice of torture generally, and the enforcement of the laws of war.

The National League of Families of American Prisoners and Missing in Southeast Asia's sole purpose is to obtain the release of all prisoners, the fullest possible accounting for the missing; and repatriation of all recoverable remains of those who died serving our nation during the Vietnam War.

The Group of Distinguished Former High-Level American National Security Officials are former public servants who have served their Nation in the national security process of the United States. The group believes that America has a great opportunity to send a powerful message that the torture of American POWs will not be tolerated.

CTL has its own vital and practical interest in the legal issues raised by this case, particularly the ramifications for

future POWs subjected to horrific torture by enemy regimes. CTL is dedicated to the principle that violators of the law of war should be brought to justice and that those brave men and women of the United States Armed Forces should be ensured recourse for such violations.

CTL's background and experience in exploring, analyzing, and researching those legal issues at stake are highly germane to this case. CTL submits this brief to illustrate the impact of the Court of Appeals decision below on the United States' commitment to protect POWs from inhuman treatment, and of the United States' national security interest of protecting its military men and women. Certiorari review is needed to correct the Court of Appeals for the District of Columbia's erroneous interpretation of the Foreign Sovereign Immunities Act ("FSIA"), the Flatow Amendment, and § 1606 of FSIA. Moreover, certiorari review is needed to remedy the court of appeals impropriety of vacating the Petitioners' judgment *sua sponte*. Given the ramifications of this case on future POWs and its consequences on national security, CTL respectfully requests leave to file the attached brief *amici curiae* in support of Petitioners.

Respectfully submitted,

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BRIEF OF THE CENTER FOR TERRORISM LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is submitted on behalf of St. Mary's University School of Law, Center for Terrorism Law ("CTL"); National League of POW/MIA Families; the National Commander and the National Adjutant of American Ex-Prisoners of War; and a group of former American distinguished high-level national security officials identified at App. A. Petitioners Colonel Clifford Acree, *et al.* and Respondent the United States of America have consented to CTL's filing of this brief. The correspondence regarding CTL's requests for consent have been filed in the office of the Clerk.

The petition presents two questions for review: (1) Does a United States citizen who has been tortured by a state sponsor of terrorism have a cause of action against the foreign sovereign under either state or federal law?; and (2) Does a United States citizen who has been tortured by a state sponsor of terror have a cause of action for violation of universally accepted international legal norms against torture?

INTEREST OF *AMICI CURIAE* [1]

The director of the CTL is professor Jeffrey Addicott, a former Army Judge Advocate, who served in senior legal positions throughout the world, and now specializes in national security law and human rights law. CTL's mission is to examine current and potential legal issues related to terrorism in light of the challenge of achieving and maintaining a proper balance between global security and civil justice.

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[1] Pursuant to Rule 37.6, amici certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the amici, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court.

CTL and all other *amici* have an interest in the effect this case will have on protecting United States military personnel held as POWs from brutal torture, and its impact on eroding a longstanding and important security policy of the United States in support of effective war fighting—this nation's commitment against the torture of POWs, the practice of torture generally; and the enforcement of the laws of war.

The decision by the D.C. Circuit in *Acree v. Republic of Iraq* dramatically undermines these national security interests. It is inconsistent with the United States' historic commitment of more than 140 years to the laws of war which protects POWs from torture and inhuman treatment. Furthermore, this decision, and the intervention of the United States in the underlying litigation prompting the *Acree* appeal which the D.C. Circuit used as a vehicle to *sua sponte* vacate the judgment, are antithetical to United States' national security interests and fatally undermine the future safety of United States military men and women who may someday become POWs. CTL submits this brief to amplify the adverse impact of the D.C. Circuit's decision on national security, and to argue that certiorari review is needed to correct the D.C. Circuit Court's erroneous interpretation of the Foreign Sovereign Immunities Act ("FSIA"), the Flatow Amendment and § 1606 of FSIA, and to resolve the far-reaching uncertainty occasioned by that decision.

SUMMARY OF ARGUMENT

During the 1991 Gulf War, Iraq savagely tortured American POWs inflicting beating; starvation; electric shock; whipping; mock executions; threatened castration and dismemberments; horrifying genital inspections; broken bones and eardrums; deprivation of medical care; and confinement in vile, disease-ridden filth. These actions were condemned by Congress in three resolutions. In April 2002, the POWs filed suit against the Republic of Iraq under a 1996 Congressional amendment to the FSIA seeking to raise public

awareness; hold Saddam Hussein and his regime accountable; deter the torture of American servicemen and women; and obtain compensation for their injuries. On July 7, 2003, a federal judge ruled in favor of the POWs, writing of Iraq's "unrestrained savagery" against our "handcuffed and blindfolded POWs," and concluding: "POWs are uniquely disadvantaged and deterring torture of POWs should be of the highest priority."

For nearly a century and a half, the United States has been committed to effectuating the laws of war which protect POWs from torture and inhuman treatment. Review by this Honorable Court of the legal issues at stake in this litigation is vital to United States' national security interests and protection of the men and women of the United States armed forces. In addition, such review may be imperative in reassuring not only the domestic population, but also the global community, that the United States remains committed to and adheres to the laws of war. Failing to protect those men and women who defend the United States with their lives from brutal torture and horrendous war crimes is tantamount to telling the world that the laws of war are no longer applicable, essentially opening the door for scores of similar incidents. Because of the far reaching impact the issues present, review by the United States' highest court is direly needed.

The D.C. Circuit Court's decision runs roughshod over decades of United States dedication to the laws of war, and sends a message to United States military personnel that while they protect their country, their country will not protect them. Both the United States of America and the Republic of Iraq have ratified the Third Geneva Convention Relative to the Treatment of Prisoners of War, making it impermissible for any High Contracting Party to absolve itself or any other High Contracting Party for "grave breaches" under Article 130, including the torture or inhuman treatment of POWs. Moreover, the United States has ratified the universal pro-

scription against torture in international human rights law which also finds reflection in its municipal law.

The decision rendered by the D.C. Circuit is nothing less than a rebuff of universally-established principles which outlaw the torture of POWs and make liable those parties engaging in such activity. By denying POW victims of torture legal recourse, the D.C. Circuit's decision endangers national security and creates a more dangerous world for the armed forces of the United States: one where those who implement torture for their own purposes are not accountable for such actions. As such, the Court should overturn the erroneous decision in *Acree v. Republic of Iraq* in which the court of appeals relied on the post-judgment holding in *Cicippio-Puleo v. Islamic Republic of Iran* concerning available causes of action under the terrorism exception to the Foreign Sovereign Immunities Act to *sua sponte* set aside Petitioners' judgment. In the alternative, the Court should grant, vacate and remand the case for reconsideration in light of the proper application of the law and the Court's decision last term in *Sosa v. Alvarez-Machain.* By taking these actions, this Court will be reaffirming the rule of law and the United States' commitment to eradicating torture at a time when such commitment is absolutely vital.

The Government contends that seeking to intervene in the litigation below was vital to national security, arguing that the Iraqi funds which the POWs sought to execute their judgment against as permitted by law were earmarked for the reconstruction of Iraq. However, this was a guise as the POWs were effectively precluded from accessing the frozen Iraqi assets, as well as assets otherwise committed to the war effort.[2] In addition, the POWs have made multiple offers to the United States to negotiate a good faith solution to any

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[2] For example, all petroleum products of Iraq are protected by Executive Order. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003).

payment, and its timing, from Iraqi assets. Moreover, the payments for infrastructure damage to Kuwait stemming from the 1990 invasion were continuing during the war from the proceeds of Iraqi oil. Indeed, the Government's contention that the case should stand as vacated begs the question: why are the treaty right interests of brutally tortured American POWs less a priority than the war debts owed by Iraq to Saudi Arabia, Kuwait and Russia?

Not only does basic fairness require an opportunity for reconsideration in light of the proper application of the law and the Court's decision last term in *Sosa v. Alvarez-Machain,* but upholding the decision of the D.C. Circuit would effectively exonerate the Republic of Iraq for its torture of POWs. This is inconsistent with the American historical commitment to the laws of war protecting POWs from torture, particularly the United States adherence to Article 130 of the Geneva Convention Relative to the Treatment of Prisoners of War, and goes against United States' na tional security interests. Moreover, the universal proscription against torture in international human rights law is ratified by the United States and reflected in its municipal law. *Amici* believe that one way for the Court to dispose of this damaging and erroneous Court of Appeals decision is to grant, vacate, and remand the case.[3]

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[3] *Amici* note that Petitioners presented five separate bases for cause of action to the District Court in their Legal Brief to the District Court. See Pet. Appendix in Petitioners' filing. Yet the Court of Appeals did not acknowledge this information in the record or credit Petitioners with stressing at oral argument before the Court of Appeals the unquestioned state law bases for cause of action under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611.

ARGUMENT

I. BASIC FAIRNESS REQUIRES AN OPPORTUNITY FOR CONSIDERATION OF ALL OTHER BASES FOR CAUSE OF ACTION BEFORE VACATING THE JUDGMENT FOR FAILURE TO STATE A CAUSE OF ACTION

This case is of great importance for the protection of American POWs from torture. Accordingly, this Court should take special care to ensure maintenance of appropriate judicial procedure. Not only has the court of appeals deprived tortured American POWs of their day in court, the court *sua sponte* set aside a valid judgment against their torturers. The Court should overturn *Acree* or remand the case for reconsideration in light of the proper application of the law and the Court's decision last term in *Sosa v. Alvarez-Machain*. Indeed, when a post-judgment decision sets aside grounds for cause of action previously believed by the judiciary to be applicable, basic fairness requires an opportunity for consideration of all other bases for cause of action before vacating the judgment on the grounds that there was no cause of action. This is particularly so when this non-jurisdictional issue is raised by the court of appeals *sua sponte* and for the first time on appeal following waiver of the issue on default by defendants, without briefing of the issue by the parties, and where both the plaintiffs and the district court relied on valid additional causes of action not considered by the court of appeals.

II. THE DECISION OF THE D.C. CIRCUIT EFFECTIVELY EXONERATES THE REPUBLIC OF IRAQ FOR THE TORTURE OF THE PETITIONERS, IS INCONSISTENT WITH THE UNITED STATES' MORE THAN 140-YEAR COMMITMENT TO THE LAWS OF WAR PROTECTING POWS FROM TORTURE AND INHUMAN TREATMENT, AND IS ANTI-THETICAL TO THE UNITED STATES' NATIONAL SECURITY INTERESTS

A. Keeping The Faith Of Our Service Personnel By Doing Everything In Our Power To Prevent The Torture Of POWs Is Of Great Importance To The National Security Of The United States.

History has shown that one of the most vital components of any democratic society is its military establishment. Nowhere is this truer than in time of war when the men and women of the armed forces are called on to kill or be killed. Since the Viet Nam conflict, the soldiers who make up the armed forces of the United States have been volunteers. These volunteers continue today to fight and die for their nation in a variety of military campaigns. While these volunteers certainly understand the dangers inherent in the profession they have chosen, they also rightly expect that the nation will do all that is necessary to protect them from unnecessary suffering. *See, e.g.*, President George Bush, Address to the Nation Announcing Allied Military Action in the Persian Gulf (Jan. 16, 1991) ("Prior to ordering our forces into battle, I instructed our military commanders to take every necessary step to prevail as quickly as possible, and with the greatest degree of protection possible for American and allied service men and women. Our troops will have the best possible support in the entire world, and they will not be asked to fight with one hand tied behind their back.") One of the most horrifying dangers associated with combat is the

specter of being captured and tortured by enemy forces. Even more troubling is the realization by American soldiers that in many of the wars that the United States has fought, the enemy has openly and flagrantly violated numerous provisions of the laws of war to include committing command-directed torture of POWs. As was the case in the Viet Nam conflict, the Gulf War of 1991 saw Iraqi command-directed torture as the systemic rule for American POWs, not the exception.

To assuage the fears our service men and women have of command-directed enemy torture, the United States must deter those nations who would engage in such brutal acts. With the men and women of the United States armed forces assuring the nation's security with their very lives, mitigating any suffering they may experience as a result of captivity is vital to furthering the faith these individuals have in the military establishment and their country.

The use of civil litigation is one critical means of curbing these human rights abuses. Thus, it is particularly inappropriate to vacate Petitioners' judgment and deny tortured American POWs an adequate opportunity to reaffirm for the court the appropriate bases for cause of action, particularly when the D.C. Circuit Court continues to permit other cases to proceed to further argument on the issue of cause of action. *See Price v. Socialist People's Libyan Arab Jamahiriya*, No. 03-7095, 2004 WL 2656891, at *5 (D.C. Cir. Nov. 23, 2004); *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1131-33 (D.C. Cir. 2004); *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004). In the *Acree* case, however, the court of appeals has set aside the law specifically believing that it is aiding the national security interests of the United States when the reality is just the opposite. In short, the court of appeals has, in contravention of the law, unfairly disfavored American POWs who voluntarily put their life on the line for their country. Moreover, the court of appeals has done this *sua sponte*. The

actions of the court of appeals send a terrible signal to tyrants that the United States does not take seriously the torture of American POWs, leaving tyrants free and undismayed from torturing our service men and women.

As set out in App. B, a letter addressed to President George W. Bush from twenty former high-level national security officials makes clear that by granting relief to these American POWs "we have a unique opportunity to establish a historic precedent that nations that torture American POWs will be held accountable." Effective war fighting by the United States requires adherence to the laws of war and failure to do so undermines the effectiveness of our actions which can cost the nation dearly in the political dimension of winning the war on global terrorism. Presented to this Court is an opportunity to rectify the mistakes made by the D.C. Circuit Court and aid in this effort. If this case stands, it would encourage brutal torture of American POWs in future wars. To the contrary, the effort of all civilized peoples has consistently been to prevent the torture of POWs. Following this rule of law is a critical component of the national security interests of the United States both in effective war fighting and in supporting our own service personnel.

B. The Prohibition Against Torture And Inhuman Treatment For POWs Is A Fundamental Principle Of Humanitarian Law And The Decision Of The D.C. Circuit If Left To Stand Would Show That The United States Does Not Take Torture Seriously, And Is Abandoning Its Historic Commitment To The Laws Of War.

International concern for and commitment to the welfare and humane treatment of soldiers in war first appeared in the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, signed at Geneva in 1864. 129 Consol. T.S. 361 (1969). A considerable majority of

nation states, including the United States, ratified this treaty. *Id.* This important Geneva Convention represents the first effort by the then-majority of nation states to develop international humanitarian law, or *jus in bello*. Frits Kalshoven, *Constraints on the Waging of War* 8-11 (1987).

Of great significance to this litigation is the historical commitment by the United States to protect POWs. In 1863, during the American Civil War, the United States issued General Orders No. 100, entitled, "*Instructions for the Government of Armies of the United States in the Field.*" Known as the Lieber Code, after its author, the order articulated stringent standards for the protection of POWs. Specifically, Article 56 states: "A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity." Richard Shelly Hartigan, *Lieber's Code and the Law of War* 56 (1983).

Inspired by the Geneva Convention of 1864, the Lieber Code of 1863, the 1868 Declaration of St. Petersburg (138 Consol. T.S. 297 (1976)), and the Declaration of Brussels in 1874 (148 Consol. T.S. 133 (1977)), the international community convened in 1899 for the First Hague Peace Conference. Kalshoven at 13-14. This Conference produced the Convention with Respect to the Laws and Customs of War on Land, with annexed Regulations 187 Consol. T.S. 429 (1979). The Convention emphasized that POWs "must be humanely treated." *Id.* at 436. The Second Hague Peace Conference of 1907 produced the Convention for the Adaptation to Naval War of the Principles of the Geneva Convention, which reaffirmed its predecessors thereby preserving the humane treatment standard for POWs. These two Conventions were ratified by the vast majority of nation states, including the United States. *Convention Concerning the Laws and Customs of War on Land*, 205 Consol. T.S. 277

(1980); *Convention for the Adaptation of the Principles of the Geneva Convention to Maritime War*, 205 Consol. T.S. 359 (1980). Moreover, the 1929 Geneva Convention Relative to the Treatment of Prisoners of War once again reiterated the rules of humanitarian law protecting POWs by mandating that they "must at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity." *Geneva Convention Relative to the Treatment of Prisoners of War*, 118 L.N.T.S. 343, 357 (1931). By the commencement of World War II, commentators consistently acknowledged that the principles, laws, and regulations set forth in the Hague Conventions, including those protecting POWs from murder and ill-treatment were extensively recognized by the community of nations as the customary international law of war. Kalshoven, at 15-16.

At the conclusion of World War II, victorious allied forces including the United States convened two international military tribunals. The first operated under the Nuremberg Charter of the International Military Tribunal. *See* 82 U.N.T.S. 279 (1945). This famous Charter defined war crimes to include "murder or ill-treatment of POWs or persons on the seas." *Id.* at Art. 6. The Nuremberg Charter was augmented by the Allied Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity which likewise forbade "murder or ill-treatment of POWs or persons on the seas." Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity, Dec. 20, 1945, *reprinted in Official Gazette of the Control Council for Germany* 50-55 (1946).

The second tribunal was established by the Charter of the International Military Tribunal for the Far East which also established subject matter jurisdiction for "conventional war crimes: namely, violations of the laws or customs of war." *Charter of the International Military Tribunal for the Far*

East, 4 Bevans 20 (1946). Conventional War Crimes refers to those articulated in the Hague Convention of 1899 and its successors which prohibited, like the Nuremberg Charter, the murder and ill-treatment of POWs.

Following the conclusion of the proceedings at Nuremberg in 1950, the United Nations International Law Commission drafted the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*. Report of the International Law Commission, U.N. GAOR, 5 Sess., Supp. 12, at 11-14, UN Doc. A/1316 (1950), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 364 (1957). These principles reinforced the prohibition against war crimes, once again, specifically prohibiting the murder or ill-treatment of POWs. *Id.* The United States ratified the Charters of both Tribunals and therefore, once again, demonstrated its steadfast adherence to the principles that protect POWs from murder and ill-treatment. Of further significance, is the fact that the murder and ill-treatment of POWs were criminalized under the 1949 Charters and hence under the international rule of law.

At present, the global regime for humanitarian law consists of four conventions plus two protocols. One of these Conventions is the Geneva Convention Relative to the Treatment of Prisoners of War. 75 U.N.T.S. 135. This Convention, like its three companion treaties which protect civilians and those *hors de combat* (incapacitated by wounds) in the field and at sea, is ratified by virtually all nation states, including the Republic of Iraq and the United States. *See* Burns H. Weston, *International Law & World Order: Basic Documents* app. 1 at 52-53 (3rd ed. 2000).

Numerous provisions in the 1949 Convention merit specific review. The first is Article 13 which requires that POWs receive humane treatment at all times. 75 U.N.T.S. 135, 146. Prohibitions include unlawful acts causing death or seriously endangering the health of POWs as well as "acts of violence

or intimidation." *Id.* Article 17 mandates that no POWs may be subjected to "physical or mental torture, nor any other form of coercion" for purposes of securing "information of any kind." *Id.* at 150. Article 23 forbids the deployment of POWs to a combat zone where they may be exposed to fire from their own armed forces. *Id.* at 154-55. Article 130 defines "grave breaches" to this Convention to include "willful killing, torture or inhuman treatment" of POWs. *Id.* at 238. Iraq violated every one of these prohibitions in its maltreatment of Petitioners.

It is important to note that America's continuing commitment to the protection of POWs does not end with its ratification of the Third Geneva Convention of 1949. As a result of the internecine civil war in Yugoslavia during the early 1990's, the United States as a permanent member of the U.N. Security Council voted in favor of the Council's establishment of the *ad hoc* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, adopted by the United Nations Security Council, May 25, 1993. SC Res. 827, UN SCOR, 48 Sess., 3217th mtg., UN Doc. S/RES/827, amended by SC Res 1166, UN SCOR, 53 Sess., 387th mtg., UN Doc. S/RES/1166. The Tribunal's statute criminalized "grave breaches of the Geneva Conventions of 1949." These grave breaches include "willful killing; torture or inhuman treatment," and intentional infliction of "great suffering or serious injury to body or health." *Id.* at Art. 2. The prohibition of these grave breaches was designed to protect all categories of non-combatants under the Geneva Conventions of 1949 including POWs, civilians or those *hors de combat*. *Id.* Article 7 of the statute establishes "individual criminal liability" which includes all those in the chain of

command from the head of state or government to the lowest subordinate. *Id.* at Art. 7. This imposition of individual criminal liability was derived from the Charters of the International Military Tribunals for Nuremberg and Tokyo in 1945 and 1946, respectively. 82 U.N.T.S. 279 (1945); 4 Bevans 20 (1946). In accordance with its prior commitments to international law, the United States remained faithful to the rule of law and the prohibition of war crimes to include willful killing, torture and inhuman treatment of persons such as POWs.

III. IT IS OF GREAT IMPORTANCE TO THE NATIONAL SECURITY INTERESTS OF THE UNITED STATES TO ADHERE TO OUR TREATY OBLIGATIONS, IN PARTICULAR ARTICLE 131 OF THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR.

The 1929 Geneva Convention Relative to the Treatment of Prisoners of War reinforces the well-established rule of humanitarian law protecting POWs by mandating that they "must at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity." *Geneva Convention Relative to the Treatment of Prisoners of War*, 118 L.N.T.S. 343, 357 (1931). The United States ratified this Convention, once again demonstrating consistent adherence to this important rule of law. Of note, is the fact that the ratification of this Treaty by the German Reich, and not by Russia, was a causative factor in the disparate treatment of Allied versus Russian POWs by the Third Reich in World War II. Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* 128 (2d ed. 1998). This situation clearly demonstrates the essential need for states to ratify and to comply with the rule of law which protects POWs.

Both the United States and the Republic of Iraq have ratified the Geneva Convention Relative to the Treatment of Prisoners of War and are therefore bound to observe its mandates. These two are included among the 192 states that have become party to this particular treaty. This provision for non-absolvable state liability is a core enforcement mechanism in the Convention. In particular, Article 131 mandates that states parties, thus including the United States, may not "absolve" a torturing state of "any liability" for grave breaches of the Convention, which includes the torture of POWs. In addition, during World War II even under the stresses of fighting the German Army, one of the most formidable military machines in history, the United States did not resort to command directed torture. This is despite the fact that the lives at stake in the movement of entire divisions was certainly as great as anything we face from terrorists today.

The United States' intervention in this litigation in essence repudiates Article 131 of this Convention's immutable rule of law protecting POWs. Such repudiation undermines national security in that it sends the unmistakable message that the United States does not value this Geneva Convention, and therefore may be assumed not to value the other Geneva Conventions which protect civilians and those incapacitated by combat wounds. The position taken by the United States in this matter imperils courageous and patriotic American military men and women who may become POWs because it informs the community of nations that rogue states will not be held accountable for state-sponsored torture of POWs.

Article 131 of this Convention states: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of "grave breaches" as defined in Article 130. *Id.* The 1949 Geneva Convention Relative to the Treatment of Prisoners of War thus affords

POWs the most comprehensive cluster of rights and protections to date and imposes liability on ratifying nation states, such as the United States of America and the Republic of Iraq, for its breach to include unlawful absolution under Article 131. This Treaty's universal ratification represents a consensus rarely achieved in conventional international law on a issue of such significance, and therefore its mandates must be observed. This, too, would be violated by the United States' absolution of Iraq in the *Acree* case. The Conventions and their Protocols call for measures to be taken to prevent (or put an end to) what are known as "grave breaches;" those responsible for breaches must be punished. Without punishment, in this instance through the use of civil litigation—a means of justice afforded by Congress to the victims of torture—the consensus against inhuman treatment to POWs is rendered nugatory.[4]

Since the key purpose behind Article 131 of the POW convention is deterrence against torture—Article 131 is one of the key enforcement mechanisms built into the POW Convention to ensure state liability for torture—this liability cannot be waived as an end of war settlement by either party. Thus, the United States is required to observe its mandates, thereby showing its commitment to the laws of war. Any deviation in this practice may open the door for others to rebuke the international norms under which wars are fought, thereby endangering our military personnel as well as our national security.

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[4] Article 131 is "self executing" under the classic Supreme Court standard of Chief Justice Marshall in *Foster v. Neilson*, 27 U.S. 253, 254 (1829), which states: "Our constitution declares a treaty to be the law of the land. It is, consequently regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." Since the obligation in Article 131 never to "absolve" a torturing State of "any liability" is a negative prohibition, rather than an engagement to perform a particular act, it clearly operates "of itself."

IV. THE UNIVERSAL PROSCRIPTION AGAINST TORTURE IN INTERNATIONAL HUMAN RIGHTS LAW IS RATIFIED BY THE UNITED STATES AND REFLECTED IN ITS MUNICIPAL LAW

As illustrated above, it has long been a United States national security policy to work for human rights and against practices such as torture. Not only has this been the policy of the United States, but the United States has also led the world in this regard, and has made it a critical element of our foreign and national security policies. Accordingly, the prevention of torture of POWs as evidenced by international humanitarian law and reflected by the United States' adherence to such laws, has been core to our national security interests and remains so.

The International Bill of Human Rights constitutes the core of international human rights law and consists, *inter alia*, of the Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., Pt. I, Resolutions, at 71, U.N. Doc. A /810 (1948), and the International Covenant for Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., at 49 (1966). The Universal Declaration at Art. 5 prohibits subjecting anyone to "torture or to cruel, inhuman, or degrading treatment or punishment." The International Covenant repeats the language of the Universal Declaration regarding torture. *Id.* at 50. Also, as to the relative importance of torture vis-à-vis other human rights, the International Covenant contains a derogation clause which operates during a "public emergency, which threatens the life of the nation" and is so proclaimed by the government. *Id.* This derogation clause allows for an abridgment of all but a few of the many rights contained in the Covenant. *Id.* Torture is excluded from derogation because of its fundamentally abhorrent nature. *Id.* The Declaration has customary international law status while the International Covenant is conventional and

was created to codify the rule of law prohibiting torture as set forth in the Declaration. Both documents are ratified by the Republic of Iraq and by the United States. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., Pt. I, Resolutions, at 71, U.N. Doc. A /810 (1948), and the International Covenant for Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., at 49 (1966). They derive inspiration from Article 1 of the U.N. Charter which promotes and encourages "respect for human rights and fundamental freedoms for all" with implementation mandated for all members in Art. 56. U.N. Charter Art. 1, para. 3. The U.N. Charter was ratified by both the Republic of Iraq and by the United States, reflecting a fundamental commitment to the rule of law and the prohibition of torture.

The International Bill of Human Rights was a catalyst for the creation of dozens of other treaties in the global and regional international community for the protection of the natural person. *See generally* Weston, *International Law & World Order: Basic Documents.* Of particular note is the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. 1465 U.N.T.S. 85. This Convention incorporates by reference the torture Articles 5 and 7 of the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, respectively. *Id.* at 113. Significantly, this Convention provides a substantial definition of torture in Art. 1. Therein, "torture" refers to the intentional infliction of "severe pain or suffering, whether physical or mental," on persons to extract "information or a confession," or to punish persons for acts they have committed or are suspected of committing. *Id.* at 113-14. Torture must be inflicted "with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.* at 114. Like the International Covenant on Civil and Political Rights, the Convention Against Torture contains a derogation clause which states that there are "no exceptional circumstances whatsoever," including

"war, internal political instability or any other public emergency" which justify torture as a lawful instrument of governance. *Id.* Notably, the United States ratified this treaty in 1994. *See* Weston, at 1304.

In accordance with Art. 2 of the Convention Against Torture, each ratifying state must give legal effect to the Convention's provisions through legislative, administrative and judicial action. 1465 U.N.T.S. 85, 114. Hence, legislation was enacted to bring United States' law into conformity. *See e.g.*, 18 U.S.C. §§ 2340, 2340B (1994). Further evidence of United States' commitment to the prohibition of torture is found in the Torture Victim Protection Act of 1991, which forbids custodial torture by officials of foreign nations. 28 U.S.C. § 1350 (1993).

Furthermore, the international human rights regime in the Western hemisphere, found principally in the American Convention on Human Rights, forbids all "torture, cruel, inhuman, or degrading punishment or treatment." 1144 U.N.T.S. 123, 146. Having signed but not ratified this Convention, the United States is obligated to uphold its object and purpose, which logic dictates would include the fundamental prohibition against torture. *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 336.

The record makes abundantly clear that Petitioners were tortured as POWs while in the custody of the Republic of Iraq. *See Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003). The rule of law prohibiting their torture is likewise abundantly clear and unambiguous. The United States' practice of foreign relations law has consistently recognized the protection of the individual against the egregious abuses of the state. The United States' intervention in this litigation to have the POWs' judgment set aside, and the D.C. Circuit's decision doing so, are inconsistent with its historic adherence to the rule of law which protects the natural person. If this case stands, it

will undermine the consistent efforts of the United States of America to end torture.

CONCLUSION

Unless the Petitioners are granted an audience before the Court, the confused United States position on this matter imperils courageous and patriotic American military men and women who may become POWs because it informs the community of nations that violators will not be held accountable for state-sponsored torture of POWs. At the least, basic fairness requires reconsideration in light of the proper application of the law and the Court's decision last term in *Sosa v. Alvarez-Machain*. The United States government's intervention in this litigation exonerates the Republic of Iraq for the torture of POWs. This is not only a deviation from the American historical commitment to the laws of war, but also contrary to national security interests. It is absolutely imperative that America protect its POWs while at the same time advancing a policy that is designed to prevent future American soldiers from enduring the horrors of torture.

As argued by the Petitioners, and supported by the foregoing additional reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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* Counsel of Record

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March 21, 2005

APPENDICES

APPENDIX A

DISTINGUISHED AMERICANS APPENDING THEIR NAMES TO THIS BRIEF OF *AMICI CURIAE*

Ms. Clydie J. Morgan
National Adjutant, American Ex-Prisoners of War

James R. Cooper
National Commander, American Ex-Prisoners of War

Vice Admiral (Ret.) Robert Dunn,
United States Navy,

and

President, Naval Historical Foundation

Major General (Ret.) Alfred F. Valenzuela,
United States Army, Formerly Commander,
United States Army South, Deputy Commanding
General, United States Southern Command; and
Deputy Joint Task Force Panama Commander

Ambassador Max. M. Kampelman,
Chairman Emeritus of the American Academy of Diplomacy,
Georgetown University Institute for the
Study of Diplomacy and Freedom House

The Honorable Anthony Lake,
Former Assistant to the President for
National Security Affairs

The Honorable John Lehman,
Member of the '9/11' Commission, and
former Secretary of the Navy

Ambassador Mark Palmer,
Former Deputy Assistant Secretary of State, and
Ambassador to Hungary

Ambassador W. Nathaniel Howell,
Former U.S. Ambassador to the State of Kuwait

Vice Admiral (Ret.) James H. Doyle, Jr.,
United States Navy,
Former Commander, U.S. Third Fleet, and
Advisory Board, International Law, Naval War College

Major General (Ret.) John K. Singlaub,
United States Army,
Former Chief of Staff, U.S. Forces, Korea

Lieutenant General (Ret.) CJ Le Van,
United States Army,
Former J3, Operations Branch,
Joint Chiefs of Staff

Rear Admiral (Ret.) Horace B. Robertson, Jr.,
United States Navy,
Professor (Emeritus) Duke University School of Law, and
Former Judge Advocate General of the Navy

Malvina Halberstam,
Professor of Law, Cardozo School of Law, and
former Counselor on International Law to the
Department of State

John Jay Douglass
Professor of Law, University of Houston School of Law,
and Committee Member of the
ABA Standing Committee on Armed Forces Law

APPENDIX B

The Honorable George W. Bush
President of the United States
The White House
Washington, D.C.

Dear Mr. President:

We write to you as former public servants who have served their Nation in the national security process of this great country. We believe you have a unique opportunity for America to send a powerful message that the torture of American POWs will not be tolerated.

American POWs have been brutally tortured in war after war. While our government has tried to deal with this horror, there have been few options realistically available to us to add deterrence against it. Indeed, some of us have wrestled with precisely this challenge while in office. Now, however, thanks to the courageous action of 17 American former Gulf War POWs brutally tortured by Iraq, and 37 of their family members, we have a unique opportunity to establish an historic precedent that Nations which torture American POWs will be held accountable. Last year these brave Americans brought suit against Iraq in United States District Court and, following a non-appearance by Iraq, an entry of default was entered on September 25, 2002. Their case will go to the equivalent of a bench trial before a federal district judge on March 31 of this year. Under current law, these American POWs and their family members will be able to enforce any final judgment obtained against the substantial Iraqi blocked assets in the United States.

This would truly be one of the first serious efforts to add deterrence against the torture of American POWs. We believe that this is an historic opportunity that should not be lost. It is time now to establish the principle that we will not return blocked assets of a former enemy state absent full account-

ability for that state's liability in the torture of American POWs. In this case, that means that no blocked assets of Iraq should be returned to that country until provision has been made for the full payment of any court judgment.

In the event that Iraq refuses to disarm, and war and the inevitable American victory comes, some will urge you to seek legislation to return all blocked assets for the future reconstruction of Iraq, thus overturning current law permitting the POWs to enforce any judgment against the blocked Iraqi assets. We understand the importance in such circumstances of American assistance in bringing about a stable new government in Iraq rooted in the rule of law. That objective should not come, however, at the cost of failing to hold Iraq responsible for its torture of American POWs. The responsibility for torture of American POWs must be regarded by the United States, as it is set out in Article 131 of the POW Convention, as a non-absolvable responsibility of the Contracting State itself. Moreover, it would be simply unthinkable to ask the American POWs tortured by Iraq to bear the cost of the reconstruction of Iraq.

Never before has an American President had such an opportunity to strike a blow against the torture of our POWs. This is truly a unique opportunity to send a signal to all future tyrants that America values the rule of law and that we will hold nations that torture American POWs accountable.

Dick Cheney, as then-Secretary of Defense, and Mrs. Cheney, and Colin Powell, as then-Chairman of the Joint Chiefs of Staff, as well as Mrs. Powell, personally welcomed these American heroes back from their brutal captivity in Iraq. A decade later, let us embrace these brave Americans in their historic effort to say "never again" to such brutal treatment of our service personnel.

Thank you for your consideration.

Sincerely,

DISTINGUISHED AMERICANS APPENDING
THEIR NAMES TO THIS LETTER

Governor Bill Richardson
former United States Ambassador to the United Nations

Ambassador Max M. Kampelman
Chairman Emeritus of the American Academy of Diplomacy,
Georgetown University Institute for the
Study of Diplomacy & Freedom House

The Honorable Anthony Lake
former Assistant to the President for National Security Affairs

The Honorable John Lehman
member of the 9/11 Commission &
former Secretary of the Navy

Ambassador Ronald F. Lehman
former Assistant Secretary of Defense for
International Security Policy & Director of the
United States Arms Control and Disarmament Agency

Admiral Thomas H. Moorer, U.S.N. (Rel.)
former Chairman of the Joint Chiefs of Staff

Admiral Paul A. Yost, Jr. U.S.C.G. (Rel.)
Commandant of the United States Coast Guard (19864 990)

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Abraham D. Sofaer
former Legal Adviser to the U.S. Department of State

Ambassador Richard Schifter
former Assistant Secretary of State
for Human Rights and Humanitarian Affairs

Ambassador Mark Palmer
former Deputy Assistant Secretary of State
and Ambassador to Hungary

Ambassador W. Nathaniel Howell
former U.S. Ambassador to the State of Kuwait

Ambassador David C. Jordan
Professor of Government and Foreign Affairs &
former U.S. Ambassador to Peru

Vice Admiral James H. Doyle, Jr. U.S.N. (Ret.)
former Deputy Chief of Naval Operations

Major General John K. Singlaub U.S.A. (Ret.)
former Chief of Staff, U.S. Forces, Korea

Lieutenant General CJ Le Van U.S.A. (Ret.)
former J3, Operations Branch, Joint Chiefs of Staff

Rear Admiral Horace B. Robertson, Jr. U.S.N. (Ret.)
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Jerome J. Shestack
Past President of the American Bar Association

Michael P. Malloy, Ph.D.
former Special Assistant for Foreign Assets Control
United States Department of the Treasury

cc: The Honorable Dick Cheney, Vice President of the United States

The Honorable Colin Powell, Secretary of State

MOTION FILED

MAR 2 1 2005

No. 04-820

IN THE

Supreme Court of the United States

COLONEL CLIFFORD ACREE, *et al.*,
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v.

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and

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) and a bipartisan group of distinguished United States Senators and Representatives respectfully move for leave to file the attached brief as

amici curiae in support of petitioners, Colonel Clifford Acree, *et al.* Consent to file this brief has been obtained from the petitioners and respondent United States of America. However, consent has not been obtained from respondents Republic of Iraq, *et al.*, who failed to make any appearance in this case in the courts below, thereby necessitating the filing of this motion.

WLF is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears in this Court and lower federal courts as *amici curiae* supporting a strong national security and defense. WLF also served as counsel in the court of appeals below to several Members of Congress who appeared as *amici curiae* supporting the petitioners.

United States Senator George Allen (R-VA) serves on the Senate Foreign Relations Committee and chairs the Subcommmittee on Europe. Senator Tom Harkin (D-IA) serves on the Defense Subcommittee of the Senate Appropriations Committee. Senator Patty Murray (D-WA) serves on the Senate Veteran Affairs Committee.

United States Representative Roscoe Bartlett (R, MD-06) serves on the House Armed Services Committee, the Subcommittee on Terrorism, Unconventional Threats and Capabilities, and Chairs the Projection Forces Subcommittee. Rep. Howard L. Berman (D, CA-28) is the Minority At-Large Whip and serves on the House International Relations and Judiciary Committees. Rep. John Conyers, Jr. (D, MI-14) is the Ranking Member on the House Judiciary Committee. Rep. Elijah E. Cummings (D, MD-07) serves on the House Government Reform and Joint Economic Committees.

Rep. Bob Filner (D, CA-51) serves on the House Committee on Veterans Affairs. Rep. Virgil H. Goode, Jr. (R, VA-05) serves on the House Appropriations Committee. Rep. Bart Gordon (D, TN-06) is the Ranking Member of the House Science Committee. Rep. Katherine Harris (R, FL-13) serves on the House International Relations Committee. Rep. Sheila Jackson-Lee (D, TX-18) serves on the House Judiciary Committee and the House Select Committee for Homeland Security. Rep. James McGovern (D, MA-03) serves on the House Rules Committee.

Rep. Gregory W. Meeks (D, NY-06) serves on the House International Relations Committee. Rep. Major. R. Owens (D, NY-11) serves on the Government Reform Committee. Rep. Charles B. Rangel (D, NY-15) is the Ranking Member of the House Ways and Means Committee. Rep. Silvestre Reyes (D, TX-16) serves on the House Armed Services Committee.

Rep. Jim Saxton (R, NJ-03) is the Chair of the Terrorism, Unconventional Threats and Capabilities Subcommittee for the House Armed Services Committee. Rep. Saxton sponsored the Flatow Amendment to the Foreign Sovereign Immunities Act (FSIA), a key provision which is relevant to this case. Rep. Ted Strickland (D, OH-06) serves on the House Committee on Veterans Affairs. Rep. Lynn Woolsey (D, CA-06) serves on the Subcommittee on Energy for the House Science Committee.

The district court found the Republic of Iraq defendants civilly liable under the FSIA for the extreme acts of torture inflicted upon petitioners Colonel Clifford Acree, *et al.*, while they were held as Prisoners of War (POW) by Saddam Hussein's regime during the 1991 Gulf War, and

awarded both compensatory and punitive damages. *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003).

In the court of appeals, Senators Allen and Murray, and Representatives Berman, Conyers, and Meeks, appeared as *amici curiae*. Represented by WLF, they successfully argued that Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003, designed to help rebuild Iraq, was not intended by Congress to make the torture exception of the FSIA inapplicable to Iraq. *Acree v. Republic of Iraq*, 370 F.3d 41, 57 (D.C. Cir. 2004). Nevertheless, the court of appeals vacated the judgment of the district court, ruling *sua sponte* that the torture victims "failed to state a cause of action." *Id.* at 60.

The court of appeals' judgment calls into serious question the viability of Congress's efforts to punish *and* deter states that sponsor terrorism and torture American citizens, including its servicemen, by making those countries civilly liable for the resultant injuries. The punishment and deterrence of state-sponsored terrorism are clearly issues of vital national importance. Those policy goals are seriously and immediately jeopardized by the court of appeals' judgment.

Congress repeatedly and consistently expressed its outrage over the brutal treatment of the petitioners by Iraq, and expressed its intent to combat the torture, hostage taking, and killing of American citizens. Since 1996, Congress has passed a series of laws aimed at stemming the rise in terrorist attacks against Americans through public, legal accountability. It is Congress's express desire that these laws, and the judgments rendered thereunder, be enforced. This objective will be seriously compromised

should the judgment of the court of appeals stand. The ruling below thus directly affects *amici*'s legislative interests and severely undercuts the right of Americans, including American POWs, to hold a foreign state liable for personal injuries caused by specific acts of torture and terrorism. Accordingly, *amici* support the POW petitioners and their families and urge this Court to grant their petition.

The petition presents two questions for review: (1) "Does a U.S. citizen who has been tortured by a state sponsor of terrorism have a cause of action against the foreign sovereign under either state or federal law?" and (2) "Does a U.S. citizen who has been tortured by a state sponsor of terror have a cause of action for violation of universally accepted international legal norms against torture?" Pet. at i. While both questions warrant review, particularly in light of this Court's recent decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), *amici* will focus their brief on the first question presented. The second question will be addressed in greater detail by the Center for Justice & Accountability in a separate *amicus* brief.

For the foregoing reasons, WLF and the bipartisan group of Members of Congress respectfully request that their motion to file the attached brief be granted.

Respectfully submitted,

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Date: March 21, 2005

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INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are set forth in the motion accompanying this brief.[1]

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than

INTRODUCTION AND SUMMARY OF ARGUMENT

In the interests of judicial economy, *amici* adopt by reference the Statement of the Case as presented by the petitioners. Pet. at 1-8. In brief, petitioners are 17 current and former United States servicemen and certain of their family members. The servicemen were held as POWs during the 1991 Gulf War with Iraq by Saddam Hussein's regime and were brutally beaten, tortured, and starved in clear violation of United States and international law.[2]

Petitioners filed suit in the U.S. District Court for the District of Columbia against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein in his official capacity for specific acts of torture that constituted common law torts of assault, battery, and intentional infliction of emotional distress. The petitioners based their

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amici or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The horrific acts of torture carried out by the defendants are briefly summarized by the petitioners (Pet. at 3) and more fully recounted by the district court in its opinion. *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003); Pet. App. C at 70a-131a. The torture included electric shocks, whipping, severe beatings resulting in broken bones, including a fractured skull, and starvation so extreme that petitioner Colonel Acree was compelled to find nourishment from eating "the scabs off his own body" and "a small piece of soiled bread he found behind the toilet" in his freezing and filthy cell. *Id.* at 186; Pet. App. C at 72a. Both the Senate and the House swiftly and strongly condemned Iraq for its illegal and brutal treatment of American POWs. H.R. Con. Res. 48, 102d Cong. (1991); S. Con. Res. 5, 102d Cong. (1991); S. Con. Res. 8, 102d Cong. (1991).

claims on four sources of law: 1) state common law of torts applicable to the defendants under 28 U.S.C. § 1606 which provides that a "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances"; 2) the Antiterrorism and Effective Death Penalty Act of 1996, including 28 U.S.C. § 1605(a)(7), which amended the Foreign Sovereign Immunities Act (FSIA) to make state sponsors of terrorism civilly liable for their acts; 3) the "Flatow Amendment" (codified at 28 U.S.C. § 1605 note) which provides a cause of action against agents and officials who carry out acts of torture; and 4) the application of *respondeat superior* principles through the liability creating provisions of 28 U.S.C. § 1606. *See* Pet. at 4.

The Iraqi defendants defaulted, and after a full review of the facts and the law, the district court entered judgment in favor of the petitioners.[3] The United States subsequently moved to intervene, arguing only that a recent appropriation measure, Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 (EWSAA), Pub. L. No. 108-11, 117 Stat. 559, and a related Presidential determination, had divested the district court of subject matter jurisdiction. The United States did not otherwise argue or assert that the petitioners had failed to state valid causes of action.

On appeal, a divided panel ruled against the United

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[3] The Iraqi defendants had previously ignored several efforts to submit the dispute to international arbitration under accepted international rules of arbitration. Pet. at 5. The offer to arbitrate is a prerequisite to filing a claim against a foreign sovereign for torture in federal court. 28 U.S.C. § 1605(a)(7)(B)(i).

States on the Section 1503 issue, finding that Congress did *not* intend to divest the district court of subject matter jurisdiction to hear and adjudicate petitioners' claim, as several congressional *amici* had argued. *Acree v. Republic of Iraq*, 370 F.3d 41, 57 (D.C. Cir. 2004); Pet. at 31a. Nevertheless, the court of appeals dismissed the action (with Circuit Judge Roberts concurring only in the judgment) by ruling *sua sponte* on an issue neither raised nor briefed by either party: the court held that despite petitioners' detailed allegations and the district court's lengthy findings of acts of *torture* -- which clearly constitute common law *torts* of assault, battery, and intentional infliction of emotional distress -- petitioners "failed to state a cause of action." *Id.* at 60; Pet. at 39a. In short, the petitioners won the battle but lost the war.

In dismissing the action, the court of appeals relied upon its earlier decision in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004) where it held that neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor a combination of the two, were sources of a cause of action against state sponsors of terrorism. Inexplicably, the *Acree* court of appeals was silent about the applicability of 28 U.S.C. § 1606, a provision of FSIA which indisputably imposes liability on certain designated foreign countries, through the operation of Section 1605(a)(7) and the Flatow Amendment, for acts of terrorism and torture that constitute common law torts. Even if *Cicippio-Puleo* were correctly decided, which *amici* submit is not the case, the Court ignored both the independent state common law bases for a cause of action and the *respondeat superior* liability of Iraq.

REASONS FOR GRANTING THE PETITION

As the petitioners have amply demonstrated, their petition should be granted because, *inter alia*, the judgment below conflicts with the Court's precedents, conflicts with decisions from sister circuits, and calls for an exercise of the Court's supervisory powers. Pet. at 8-25; *see also* Sup. Ct. R. 10(a), 10(c).[4] While *amici* wholeheartedly agree that these reasons warrant this Court's review of the questions presented, *amici* wish to emphasize that review should be granted because the petition raises an important question of federal law of paramount concern to the Congress and the Nation as a whole. *See* Sup. Ct. R. 10(c). Indeed, this case is of unique importance because it was the first instance in which POWs who were tortured by a foreign state had obtained a judgment against the country responsible for their injuries.

WHETHER A U.S. CITIZEN WHO HAS BEEN TORTURED BY A STATE SPONSOR OF TERRORISM HAS A CAUSE OF ACTION AGAINST THE FOREIGN STATE IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

The judgment below calls into question the viability of Congress's efforts to punish and deter states that sponsor

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[4] Review by this Court is particularly warranted because, as the petitioners noted, the District of Columbia Circuit that rendered the judgment below is the circuit chosen by Congress as the venue in which almost all of these kind of cases are to be adjudicated. Pet. at 24 & n.9 (citing 28 U.S.C. § 1391(f)).

terrorism and torture American citizens, including its servicemen, by making those countries civilly liable for the resultant injuries. The punishment and deterrence of state-sponsored terrorism are clearly issues of vital national importance; those policy goals are seriously and immediately jeopardized by the court of appeals' judgment.

Under the Constitution, Congress has considerable and unquestionable authority to enact the legislation *sub judice* as well as sole power to regulate the jurisdiction of Article III courts. The erroneous interpretation by the court below of the relevant statutory provisions, and the court's crabbed reading of petitioners' Complaint alleging acts of torture (which more than satisfied general notice pleading standards), threatens to eviscerate Congress's efforts to allow American victims of state-sponsored terrorism to hold those countries liable for injuries in a federal court.

Accordingly, this Court should grant the petition and reverse the decision below. Indeed, as petitioners suggest, the lower court's judgment was so clearly erroneous that the Court should consider summarily granting the petition, vacating the judgment below, and remanding the case to the court of appeals with instructions to affirm the district court. *See* Pet. at 3.

A. United States Policy of Permitting Torture Victims To Hold States That Sponsor Terrorism Civilly Liable Is Undermined By The Judgment Below

The court of appeals' decision weakens an important weapon that Congress placed in the Nation's arsenal to fight the war on terrorism. Such a momentous and grave

decision raises a national issue of vital importance because it greatly diminishes the deterrent effect that Congress sought to create.

Equally troubling, the court of appeals, in its attempt to justify the dismissal of petitioners' case, expressed its own view of the "magnitude of [the] default judgment" and "its impact on the United States' conduct of foreign policy. . . ." 370 F.3d at 60; Pet. at App. 39a.[5] This blatant example of judicial interference in the conduct of foreign policy is both wrong and misguided. In another lawsuit by victims of Iraqi torture, *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000), the United States District Court for the District of Columbia refused to apply the Act of State doctrine and dismiss the lawsuit, stating:

> The designation of Iraq as a terrorist state was made by the Secretary of State on behalf of the Executive Branch under an express grant of authority by Congress. For this Court to grant defendant's motion to dismiss on act of state grounds would constitute more of a judicial interference in the announced foreign policy of the political branches of government than to allow the suit to proceed under the explicit authorization of Congress.

Id. at 55. So even on foreign policy grounds, the court got it wrong. Absolving those who torture American POWs of liability is prohibited by Article 131 of the Third Geneva

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[5] Lest there be any doubt, *amici* note that a ruling in favor of the petitioners would not interfere with rebuilding Iraq or cause the attachment of Iraqi assets needed for that effort. *See* Pet. App. G at 214a.

Convention, 75 U.N.T.S. 135 (the POW Convention), and encourages torture of American POWs in future wars. Large judgments against state sponsors of terrorism *further* United States foreign policy goals that such countries should be punished and deterred. If anything, the decision below will have the opposite effect. It will deter victims of torture from bringing suits of the type that Congress deliberately sought to encourage, and give aid and comfort to state sponsors of terrorism, including those that torture captured United States service personnel.[6]

Congress has consistently expressed its intent to hold foreign states civilly liable in federal courts for their acts that inflict physical injury and death upon Americans. *Amici* will first briefly list some of those enactments to underscore the grave importance of the issue, and then discuss some of their pertinent provisions in greater detail as they relate to this case.

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[6] The Islamic Republic of Iran is the most prolific state sponsor of terrorism according to the State Department. *See* U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2003 at 88 (2004). Iran has closely followed the development of the legislative scheme enacted by Congress to deter and punish state-sponsored terrorism and the resulting court cases. Members of Iran's Foreign Ministry have publicly vented their disagreement with Section 1605(a)(7) verdicts. *See* S. Jason Baletsa, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1284 n.221 (2000). The immediate effect of this scheme has been to create a claim by the families of victims of Iranian terrorism upon hundreds of millions of dollars of Iranian assets frozen in the United States since 1979. While Iran may choose to ignore the trials and refuse to send defense counsel to appear, it cannot ignore the financial impact these judgments have upon its treasury.

1. In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA), a provision of which, 28 U.S.C. § 1606, provides in pertinent part that a "foreign state *shall be liable* in the *same manner* and to the *same extent* as a private individual" if it has been stripped of its immunity under 28 U.S.C. § 1605 (emphasis added).

2. In April 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act. Section 221 of the Act expressly amended the FSIA by adding 28 U.S.C. § 1605(a)(7) to allow American victims to seek "money damages . . . against a foreign state" for personal injuries caused by acts of "torture," "hostage taking," and similar acts "if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency. . . ."

3. In October 1996, Congress enacted the Civil Liability for Acts of State Sponsored Terrorism Act, the so-called "Flatow Amendment." Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified at 28 U.S.C. § 1605 note). The Flatow Amendment provides that foreign officials and agents, "while acting within the scope of his or her office, employment, or agency, shall be liable" for torture and terrorism arising under Section 1605(a)(7). The Flatow Amendment also expands the scope of damages available to the victims to include punitive damages.[7]

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[7] This amendment was sponsored by *amicus* Representative Jim Saxton of New Jersey who referred to it as the "Flatow Amendment" in honor of Alisa Flatow, a 20-year-old Brandeis University student killed in 1996 by the Palestinian Islamic Jihad in a bus bombing while studying abroad in Israel. *See* Joseph W.

4. In 1998, Congress again amended the FSIA (Section 117 of the Treasury Appropriations Act of 1999) to provide that any property of a state sponsor of terrorism that was frozen could be subject to execution or attachment in aid of a judgment against that state pursuant to the FSIA. 28 U.S.C. § 1610(f)(1)(A).

5. In 2000, the Congress and the Administration agreed on legislation that would ensure access to the courts and blocked assets of a foreign state supporting terrorism. Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, provided for payment to a group of victims designated in the enactment who received funds directly from blocked assets, as well as assets linked to blocked assets.

6. The Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, Title II § 201, 116 Stat. 2337 (2002) (codified at 28 U.S.C. § 1610 note) provided that persons who possess final judgments from United States courts against foreign states pursuant to Section 1605(a)(7) may satisfy their judgments from the blocked assets of that party.

By enacting these broad and comprehensive measures, Congress made it abundantly clear that state sponsors of terrorism would be subject to civil liability by

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Dellapenna, *Civil Remedies for International Terrorism*, 12 DEPAUL BUS. L.J. 169, 256 n.439 (1999-2000); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

their victims to punish them and alter their behavior.[8] A closer examination of the pertinent provisions as they relate to the instant action demonstrates that the court of appeals clearly erred in dismissing this case.

1. *Section 1606 of FSIA*

The Congress could not have made it any clearer in Section 1606 of the FSIA when it provided for a cause of action against certain foreign states: a "foreign state not entitled to immunity under section 1605 . . . *shall be liable* in the *same manner* and to the *same extent* as a private individual under like circumstances . . . ." 28 U.S.C. § 1606 (emphasis added). Iraq was not entitled to immunity under Section 1605(a)(7) because it was then designated as a sponsor of terrorism and had tortured the petitioners. Ergo, Iraq was liable for the injuries it inflicted on petitioners "in the same manner" and to the "same extent" as would a private person. That should have been the beginning and the end of this case.

Remarkably, in dismissing petitioners' claims, the court of appeals completely ignored Section 1606 as well as this Court's precedent interpreting Section 1606 in the context of commercial suits against foreign states. In *First Nat'l. City Bank v. Banco Para el Comercio Exterior de*

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[8] This legislative scheme has borne fruit in the form of the recent billion dollar settlement with Libya for its role in the Pan Am 103 airline crash; awards of hundreds of millions of dollars in frozen Iranian assets to American victims of Iranian terrorism; and similar awards in frozen Cuban assets to American victims of Cuban terrorism. These cases thus serve as valuable precedent for holding a foreign country responsible for torturing and murdering Americans.

Cuba, 462 U.S. 611, 622 n.11 (1983), this Court stated that FSIA "requires the application" of "state law" against a foreign nation where such rule of liability would be used against a private party.[9]

Thus, in a FSIA suit against a foreign country, whether sounding in contract or tort, courts look to state law for rules of liability. Here, petitioners adequately alleged traditional common law claims for the torts of assault, battery, and intentional infliction of emotional distress.[10] Congress therefore need not have enacted any

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[9] As petitioners further note, Section 1606's liability creating language is nearly identical to that of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674, which similarly provides for a cause of action against the United States for certain torts committed by its agents, and where state law is chosen as the rule of liability. Pet. at 22. The absence of an express reference to state law in Section 1606 is of no moment, for 28 U.S.C. § 1652 provides that unless otherwise specified, state law "shall be regarded as rules of decision in civil actions" in federal courts. In short, as petitioners explained, the court below hopelessly confused choice of law questions with the issue of whether petitioners stated a cause of action. Pet. at 15, n.2.

[10] General notice pleading under Fed. R. Civ. P. 8 requires only that a "short and plain statement" of plaintiffs' claim be made. *Compare* Fed. R. Civ. P. 84 (the "Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate") *and* Form 9-Complaint for Negligence (sample claim for liability for negligence stated in conclusory sentence that "defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway") *with* the detailed *pages* of claims of torture by petitioners that constitute intentional torts of assault, battery, and intentional infliction of emotional distress. Indeed, the petitioners filed a memorandum in the district court detailing four legal bases for cause of action, with a fifth under

additional provisions expressly providing for a "private right of action" in order for plaintiffs to vindicate their rights as the court of appeals mistakenly suggested below in relying on its flawed decision in *Cicippio-Puleo*.

2. *Section 1605(a)(7) of FSIA*

In 1996, Congress made it clear with the passage of Section 1605(a)(7) that victims of torture would have the right to file claims against state sponsors of terrorism. As petitioners correctly note, Section 1605(a)(7) is replete with a number of features that evidence Congress's intent that victims would be able to file lawsuits against a foreign country. Pet. at 15-16. For example, Section 1605(a)(7) has its own statute of limitations provision: "No action *shall be maintained under subsection (a)(7)* unless the action is commenced no later than 10 years after the date on which the cause of action arose." 28 U.S.C. § 1605(a)(13) (emphasis added). An action "maintained under subsection (a)(7)" presupposes that it was filed under that subsection to begin with.

At a minimum, there can be no doubt that Section 1605(a)(7), read in tandem with Section 1606's "shall be liable" provision, provides victims with such a cause of action. For example, breach of contract and similar lawsuits are filed by American companies under Section 1605(a)(2)'s "commercial activities exception" to the

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international law if needed. *See* Pet. App. G at 205a-212a. Three of these causes of action remain viable even if *Cicippio-Puleo* were correctly decided. The court of appeals' conclusion that petitioners "failed to state a cause of action" under the liberal rules of pleading was truly remarkable and clearly erroneous.

immunity of foreign states without the necessity of invoking an additional companion federal statute providing for a cause of action for such injuries. Rather, courts simply use the law that emerges from a conflicts of law analysis or of the law of the country agreed to in a forum selection clause of the contract in issue as the rule of liability. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 374 (1993); *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 (D.C. Cir. 2003) (both cases citing to *First Nat'l City Bank* that ruled "where state law provides a rule of liability governing private individuals, the FSIA requires application of that rule to foreign state in like circumstances.").

In the same vein, no additional cause of action or source of law is needed by petitioners to bring claims sounding in tort against a foreign country for acts of torture. The common law torts of assault, battery, and intentional infliction of emotional distress suffice.

Indeed, the legislative history of Section 1605(a)(7) is replete with language that demonstrates Congress's clear understanding and intent that by lifting immunity, lawsuits against state sponsors of terrorism would be allowed to proceed. There is absolutely no evidence that Congress believed that an additional statutory cause of action would be necessary to enable victims to take advantage of its provisions.

As petitioners noted, statements by prominent sponsors and advocates of the early versions of Section 1605(a)(7) to the FSIA made it clear that Congress intended to give victims of terrorism a right for the explicit purpose of striking back at the state sponsor of terrorism that injured them, rather than a hollow remedy. Pet. at 16, n.3 (citing

to, *inter alia*, statements by Senator Specter and Representatives Fox, Ros-Lehtinen, and Hyde to the effect that Section 1605(a)(7) would give victims the right to sue terrorist countries and obtain money judgments).

The House Judiciary Committee that first considered the Section 1605(a)(7) amendment to FSIA discussed the applicability of the original amendment in its report. "The amendments made by this Act shall apply to any cause of action arising *before*, *on*, or after the date of the enactment of this Act." H.R. REP. NO. 103-702, at 1 (1994) (emphasis added). The Committee could not have made it any clearer when it stated that the amendments would allow U.S. citizens who were victims of certain terrorist acts "to maintain a *federal cause of action* for damages against the foreign government involved." *Id.* at 2 (emphasis added). Congress thus expected the enactment would lift immunity from the foreign state defendant, allowing claimants to utilize already existing causes of action under state or common law. *See id.* ("Courts may look to state law for guidance as to which parties would be proper wrongful death claimants."); *id.* ("H.R. 934 would add a new exception to the FSIA which would allow U.S. citizens who are subjected to torture, summary execution, or genocide abroad by a foreign sovereign to bring suit in the United States against the foreign sovereign.").

Section 1605(a)(7) was proposed and considered again as part of the Comprehensive Antiterrorism Act of 1995. The House Judiciary Committee again explained that passage of the exception would allow suits to proceed:

> Also responding to the tragedy of the Pan Am 103 bombing is section 804, which would amend the

> Foreign Sovereign Immunities Act (28 U.S.C. § 1602, *et seq.*) to permit suits by U.S. nationals against foreign states in U.S. courts . . . seeking money damages for personal injury or wrongful death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or providing material support or resources for such acts.

H.R. REP. NO. 104-383, at 62 (1995). The House Conference Report stated that the purpose of the legislation was "to prevent and punish acts of terrorism." H.R. CONF. REP. NO. 104-518, at 1 (1996). Indeed, the legislative "subtitle" of the Antiterrorism and Effective Death Penalty Act of 1996 is "An Act to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes." Pub. L. No. 104-132, 110 Stat. 1214.

In short, there can be no doubt that the Congress fully intended that Section 1605(a)(7) would allow victims of terrorism and torture to file civil lawsuits against the states that sponsor such acts.

3. *The Flatow Amendment*

Five months after enacting Section 1605(a)(7), Congress enacted the Flatow Amendment to further expand on the right of Americans to file civil lawsuits, and to expand the scope of available damages to include punitive damages.[11] As previously noted, the Flatow Amendment

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[11] In the 1997 Omnibus Consolidated Appropriations Act, "the 'Flatow Amendment' revised the FSIA to expressly provide that punitive damages were available in actions brought under the state-

provides that a foreign state's "officials, employees, and agents" "*shall be liable*" (just as a foreign country "shall be liable" under Section 1606) for those acts that (1) are committed "while acting within the scope of his or her office, employment or agency," and (2) result in the "personal injury or death" of a U.S. national. 28 U.S.C. § 1605 note (emphasis added).

It is true that the Flatow Amendment alone does not expressly provide for a cause of action against a foreign state and only refers to individuals. The court of appeals, however, incorrectly interpreted the Flatow Amendment as providing nothing more than a cause of action against a foreign official or agent in his or her *personal* capacity for support of terrorism. *Acree v. Republic of Iraq*, 370 F.3d 41, 48 (D.C. Cir. 2004). Clearly, state sponsors of terrorism are unlikely to be deterred by personal lawsuits against their officials or agents, and who are likely to be judgment proof. Officials in acting in their private capacity were already liable for such actions prior to the passage of the Flatow Amendment. *See* Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note. Additionally, personal capacity suits against foreign government officials or agents do not require a waiver of foreign sovereign immunity. *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997). So if the Flatow Amendment, a cause of action inserted within the FSIA, only provides for personal capacity suits against government officials, it would be completely superfluous. Furthermore,

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sponsored terrorism exception to immunity. This was done to ensure that the state-sponsored terrorism exception had a deterrent effect--the potential for substantial civil liability." H.R. REP. NO. 106-733, at 26 (2000).

if a cause of action were limited to suits against the officials only in their personal capacities, service of process upon those individuals would not likely be effected.

Accordingly, Congress would not have intended the Flatow Amendment to be an empty promise or mere redundancy in the law. Rather, it is clear that Congress intended that the amendment expand the reach of the law and the scope of damages; and through well-established principles of *respondeat superior* and Section 1606, the foreign country itself would be liable for the acts of its agents.

The court of appeals would have us believe a fiction: that Congress, deeply concerned with state-sponsored acts of terrorism, had taken great pains to set the stage on which victims could bring their torturers to justice; provided the venue for the drama (mostly in the District of Columbia); determined the timing of the event (through the enactment of a statute of limitations and the prerequisite of arbitration); identified the *dramatis personae*; and provided compensation for the heroes and heroines, and yet did not want the curtain to rise. The court of appeals rewrote Congress's script, changing the drama into a tragedy.

Congress is not in the business of enacting nullities, yet the judgment below transforms a comprehensive legislative scheme under which state sponsors of terrorism have no immunity from civil suits into one that effectively shields them from such suits. Congress either enacted a nullity or its comprehensive legislative scheme, enacted for the purpose of compensating victims and deterring state-sponsored terrorism, has been eviscerated by the court of appeals. Accordingly, this Court's review of the judgment

is crucial in providing much needed guidance to the court below and to dispel the confusion its ruling has created.

B. The Decision Below Threatens To Deprive The United States of Substantial Collateral Benefits In The War On Terror

Plaintiffs who have brought Section 1605(a)(7) cases are in a position to supply important intelligence to United States law enforcement officials from various agencies. For example, when Alisa Flatow was killed in 1996 in the Gaza Strip, Yassir Arafat denied the FBI's requests to enter the area for the collection of evidence. Lawyers representing the Flatow family were nevertheless able to travel to the scene and secured crucial evidence that was subsequently turned over to the FBI. This evidence assisted the FBI in building its case against Sami Al-Arian for his role in the United States in raising funds for the Palestinian Islamic Jihad, the group responsible for murdering Alisa Flatow, as well as other Palestinian terrorist organizations.

Plaintiffs' lawyers thus have the incentive and professional obligation to investigate and obtain evidence that might escape the attention of U.S. law enforcement agencies that are otherwise engaged. This collateral benefit from bringing civil lawsuits would be jeopardized if the judgment below were allowed to stand.

CONCLUSION

For the foregoing reasons and those provided by the petitioners, the petition for writ of certiorari should be granted.

Respectfully submitted,

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